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JURISDICTIONAL STATEMENT

In 1996, the State charged Appellant Kenneth Thompson with two counts of first-degree murder, §565.020, for killing his mother-in-law, Arlene Menning, and her husband, Clarence Menning.[1] This Court affirmed Kenny's conviction, State v. Thompson, 985 S.W.2d 779 (Mo.1999), but remanded for a new sentencing trial, at which the jury returned verdicts of life imprisonment. The court polled the jury and ordered further deliberations. Minutes later, the jury announced it was deadlocked. The judge assessed the punishment at death. This Court has exclusive jurisdiction of the appeal. Mo.Const., Art. V, §3.

[1]All statutory references are to the Revised Missouri Statutes, 2000.

STATEMENT OF FACTS

Kenny Thompson worshiped his wife Tracey (Tr.895,994).[2] He took Tracey back in after she abandoned him for another man (Tr.895-96, 911,915). When she told him that they must split again, he begged her to give the relationship another try (Tr.247-49,251-52,297,303). Kenny knew Tracey was again leaving him for another man (Tr.303,698). Living out of his van, working full-time, Kenny watched the children so Tracey could be with the other man (Tr.656,692-94). Kenny was desperate to convince Tracey to come back and keep their family together (Tr.411,418).

The Relationship

Kenny was first married to Linda, and they had two daughters (Tr.291). Linda left Kenny to be with another man, Robert (Tr.745). Kenny blamed Robert for ruining his marriage and occasionally followed Robert in his car, but trouble never ensued (Tr.747-48).

Kenny and Tracey married, and they started out in a trailer behind another trailer owned by Tracey's mother (Arlene) and stepfather (Clarence Menning) (Tr.288). Kenny helped Clarence run his paper route, take care of the farm animals, and repair the trailers (Tr.289-90).

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[2] The Record on Appeal consists of a transcript (Tr.), a legal file (L.F.), and exhibits. This Court has taken judicial notice of the Record on Appeal from the first trial (1st Tr.).

Kenny learned that Linda and Robert wanted to adopt Kenny's two daughters (Tr.291-92;746). When Kenny called Linda, Robert explained that it was in the girls' best interests, to give them stability (Tr.746). Kenny told Robert that he would not challenge the adoption; that if Robert sent him $1,000 he would leave the state and sign the papers (Tr.746). Although he wanted to see his daughters, he did not want to fight the adoption because he and Tracey could not afford a lawyer (Tr.291-92). It was a hard time for Kenny, and he cried a lot (Tr.291-92). But Tracey was pregnant with their daughter, Breanna, and that helped Kenny get through it (Tr.292). Kenny and Tracey were also raising Myles, who was Tracey's child by another man (Tr.244,249).

At times, the couple had financial difficulties (Tr.294). During these times, they would move in with Tracey's parents (Tr.294). Tracey had several bad check convictions and Kenny had at least eight (Tr.294-95,788-95). At least one of Kenny's convictions arose from Tracey's actions, and Kenny spent time in the Morgan County Jail to cover for her (Tr.430). Tracey also had a conviction for tampering with a witness (Tr.296).

Sometime in 1991, the couple moved to South Dakota (Tr.316,894,919). Kenny was Tracey's best friend and an attentive father who spent time with the kids, feeding them, changing diapers, and generally caring for them (Tr.316-17;895,904). He helped Tracey with the cooking and gave her everything she wanted (Tr.895).

At some point during the marriage, Tracey ran off and married another man, Kent Palmer (Tr.288,895-96,911). Kenny was devastated (Tr.911). When he was not working, he cared for the children (Tr.913). Eventually, Tracey returned to Kenny (Tr. 288). About a month later, they moved back to Missouri, where their son Dustin was born (Tr.262,326,915,995). Tracey felt Kenny then changed and became abusive (Tr.326).

In July, 1996, Kenny's cousin Billy died in a car accident (Tr.293). Kenny took Billy's death very hard--he had grown up with Billy and was very close to him (Tr.293). That same month, Kenny, Tracey, and the three kids moved back in with the Mennings (Tr.246, 258).

The Relationship Ends, Tragedy Unfolds

On Wednesday, July 31, 1996, Tracey asked Kenny to leave (Tr. 247, 297). Kenny did not take it well, so Tracy had Clarence tell Kenny to leave (Tr.248). Kenny kept asking why he had to leave, but left without incident (Tr.249).

The next day, Kenny and Tracey made arrangements for Kenny to see the children so Tracey would have some time to herself (Tr.249, 655). Kenny picked up Dustin and Breanna, and Tracey went to her new boyfriend, her cousin, Dean (Tr.249-50).

Later that evening, Kenny invited Tracey to dinner to discuss their relationship (Tr. 251). Over dinner, Kenny told Tracey that he wanted the

marriage to work, but Tracey insisted it was over (Tr. 251). Tracey told Kenny that she wanted to go home and left with the children (Tr.252).

Kenny followed and motioned for Tracey to pull over (Tr.252). He asked her to have coffee with him; Tracey agreed, so Kenny got her a drink (Tr.252). Kenny asked Tracey to reconsider her decision about the relationship, but Tracey refused (Tr.252).

Tracey wanted the weekend free so she could be with Dean (Tr.253). She asked Kenny if he would watch the children over the weekend, and Kenny agreed (Tr. 253). On Friday, when Tracey dropped the children off with Kenny, she "cussed him out" for failing to replace the battery in her car (Tr.253). She then spent the weekend with Dean in a motel (Tr.300).

Kenny was now living in his van (Tr.520,692). Because he was working full-time, he made arrangements for his family members to babysit the children while he was at work (Tr.692-94).

Tracey was supposed to call Kenny on Sunday morning to arrange to pick up the children (Tr.301). Tracey knew that because she had kicked Kenny out, he would be waiting at his aunt's house at 10:00 to receive her phone call, and she knew he would worry if she did not call (Tr.301). Tracey decided not to call, because she did not want Kenny controlling her (Tr.302). Throughout the day, Kenny called Dean's house repeatedly (Tr.694). He went to Dean's house and left several notes on Tracey's car (Tr.304).

Finally, at about 4:00 that afternoon, Kenny reached Tracey and asked her to come to his mother's house to pick up the children, but Tracey refused (Tr. 255). So Kenny brought the kids to Dean's house (Tr.255). He noticed that Tracey had a hickey on her neck and asked if she had had sex with Dean (Tr.255-56). According to Tracey, she told Kenny that it was none of his business, but Kenny recalled that she told him that she had had sex with Dean twice over the weekend (Tr.255-56, 428, 698). Kenny still wanted to try to work on the marriage; in the past, Tracey had left and come back to him (Tr.303). Tracey again insisted the marriage was over; she went into the house, and Kenny left (Tr.256, 303).

At about 9:00 that evening, Tracey returned home and put the two children to bed (Tr.257, 262). Kenny called several times, asking when he could see the children again and wanting to come get some of his things (Tr.263). Tracey told him that she would bring his things to him the next day and that he could see the children then (Tr.263). Tracey told Kenny not to call anymore that night and hung up (Tr.263).

Kenny went to his mother's house and played cards most of the night (Tr.658). Afterwards, he went out in the backyard and practiced shooting (Tr.658-59). His mother came out and asked Kenny not to do anything stupid--she was worried that Kenny would hurt himself (Tr.658,1006). Kenny left and drove around, ending up at the cemetery where his father is buried (Tr.659). He visited his father's gravesite and asked him what he should do (Tr.659).

Kenny resolved to speak with Tracey again (Tr.411,418). He headed to the Mennings' trailer, arriving there at about 2:00 or 3:00 a.m. (Tr. 428,660). His aim was solely to speak with Tracey, without interference, to try to work out their marital troubles (Tr.411,418).

Kenny left his van across the road from the trailer and took a pair of pliers, a roll of duct tape, a can of gasoline, a maul handle, and a .357 magnum (Tr.411-12). He used the pliers to cut the phone lines (Tr.412). He carried the gun to protect himself against Clarence, since Clarence was a big man (Tr.416). He carried the gas can, because Tracey's car was always out of gas (Tr.419). As he got there, he realized that they would not be able to take Tracey's car, so he set the gas can on the front porch (Tr.419). He carried the duct tape so he could restrain the Mennings (Tr.417).

Kenny entered the trailer, checked on the kids, and walked to the Mennings' bedroom (Tr.412). Kenny realized that he would not be able to tape Clarence without waking him (Tr.417,702). He decided to knock out Clarence and Arlene, who were both sleeping (Tr.420). He struck Clarence, then Arlene, in the head with the maul handle (Tr.412-13).

Tracey woke to her dog barking and a thumping noise (Tr.264). She yelled at her dog to shut up and went back to sleep (Tr.264). When Kenny heard Tracey yell at the dog, he got scared and started hitting the Mennings again (Tr.662). He laid the maul handle by a wall in the bedroom (Tr.413).

Arlene and Clarence each died as the result of at least three blows to the head (Tr. 777-78,780,782). Arlene had bruising and a cut to her left hand, consistent with defensive wounds (Tr.782-83). There is no way of knowing whether they were in fact defensive wounds, or instead, if Arlene's hand was near her head when she was struck (Tr.784). Arlene's head and at least one arm (her right arm) moved during or after the assault (Tr.606-07,609-11,616-17,639-40). Clarence never moved (Tr.641).

Tracey woke again to find Kenny standing over her naked, holding a gun (Tr.264). Kenny straddled Tracey and restrained one of her arms (Tr.265). When she yelled for her parents, Kenny told her it would do no good, since he had tied them up in their bed (Tr.266-66). Kenny forced Tracey to submit to oral sex, fondled her breasts and had sexual intercourse with her (Tr.266-67). He asked her repeatedly why she wanted out of the relationship (Tr.266).

Afterwards, Tracey used the bathroom while Kenny got dressed (Tr.267). Kenny told Tracey that she and the kids would be going with him, but Tracey refused (Tr.267). When Tracey told him that she could not leave because she had no shoes, Kenny got her a pair of slippers (Tr.269). Kenny led Tracey by the arm out of the house (Tr.269). Tracey kept telling Kenny that she was not going, and Kenny told her that she was (Tr.269). When she refused to walk any further, Kenny picked her up and put her over his shoulder (Tr.269). Tracey asked Kenny to put her down, because he was hurting her, and he put her down right away

(Tr.270). When they reached Kenny's van, he put Tracey in, and they drove back to the trailer (Tr.270).

When they pulled up, they could see Myles standing at the window (Tr.270-71). Kenny told Tracey to stay in the van, and he went inside to get the kids (Tr.271). He left the trailer carrying Dustin, with Breanna in front of him, and leading Myles by the arm (Tr.271). Tracey wanted Myles to go back into the house to check on Arlene and Clarence, but Kenny would not let him (Tr.309). Tracey argued with Kenny, telling him that they would not leave with him (Tr.272). Kenny threatened to hurt the kids if she did not come, so Tracey let Kenny put the children in the van (Tr.272). Kenny gave the children soda (Tr.704). Tracey sat on the step of the van and refused to go any further (Tr.273). Kenny duct-taped Tracey's arms and legs (Tr.273). As soon as Tracey agreed to come, he removed the duct tape (Tr.273).

Kenny drove through the countryside for a few hours, asking Tracey why she wanted to start a relationship with Dean (Tr.274,310). He drove aimlessly, seemingly confused, and asked Tracey, "what am I doing?" (Tr.310-11). At one point, Tracey threatened to jump out of the van, so Kenny held her arm (Tr.274). When Dustin climbed onto Tracey's lap, she told Kenny that she would not jump, and Kenny let go of her arm (Tr.274).

Kenny stopped on a gravel road (Tr.275). Tracey kept asking him to let her check on her mother and Clarence (Tr.275). Kenny told her that she did not want to do that (Tr.275). Tracey screamed at Kenny, "Why?" and Kenny told her that

he had killed them (Tr.275). Tracey did not believe him, because she did not believe he could do that (Tr.275).

Eventually, Kenny agreed to drop Tracey and the kids off at Dean's house (Tr.275). She promised Kenny that she would not report him to the police (Tr.276). As he dropped Tracey off, Kenny told Tracey that he wanted to stay in touch with her and the kids (Tr.276).

Tracey arrived at Dean's house at about 5:30 or 6:00 in the morning (Tr. 312). She still did not believe that Kenny had hurt her parents (Tr.312). Tracey called a neighbor of her parents to ask her to check on them (Tr.278, 313). Kenny's mother called and asked Tracey what Kenny had done (Tr.277). Kenny also called and asked what he had done, since he could not remember (Tr.277, 312). Shortly after 6:00, Tracey called the Benton County Sheriff's Office and reported she had been raped (Tr.314). At about 7:00, Tracey again asked the neighbor to check on her parents (Tr.278). She called Dean at work and asked him to come home (Tr.278).

The neighbor returned to the trailer, let herself in, and walked down the hall to the bedroom (Tr.339-40). She saw the bodies and left immediately to call the sheriff (Tr.340-41).

Kenny Cooperates With the Police – Gives Full Confession

Meanwhile, Kenny drove to Sedalia (Tr.415). He left his van at a service station and borrowed a car from a friend (Tr.415). He planned to go to Warrensburg and catch a train to Colorado (Tr.416). He picked up his paycheck

and cashed it, telling his boss he needed the money to fix his van (Tr.670-71,766). He bought a clothing bag and called the train station to find out how much it would cost to go from Warrensburg to Lee's Summit (Tr.671). Because Kenny had a set of keys to the Mennings' newspaper route, he was able to take money from three newspaper boxes (Tr.671). Kenny drove to the train station, where he called his mother (Tr.672).

The Sheriff of Morgan County, Sonny Earnest, received a call from the Benton County Sheriff to watch for Kenny, since Kenny's family lived in Morgan County (Tr.401-02). Earnest learned where Kenny's mother lived and drove there (Tr.403). When he arrived, Kenny's brother Paul was speaking on the phone with Kenny (Tr.403). Kenny agreed to speak with Earnest (Tr.403). After a few minutes, he asked Earnest to meet him and take him in, and Earnest agreed (Tr.404). Kenny told Earnest where he was and gave him directions (Tr.404). When Earnest arrived about an hour later, Kenny was exactly where he said he'd be (Tr.404-05, 425). Kenny was visibly upset, shaky, and had tears in his eyes (Tr.426).

Sergeant Hite took custody of Kenny from Earnest and brought him to the local sheriff's office (Tr.407). En route, Kenny was anxious to talk about what had happened (Tr.373). He told Hite that he felt he had done something terribly wrong and recalled tying up Clarence and Arlene and seeing Clarence's face bloody (Tr.373, 376-77). He explained that he and his wife were having marital problems, and that his wife had been having sex with another man (Tr.386). He

also was worried that he might have gotten his brother Paul in trouble after taking Paul's unregistered handgun (Tr.374). He told Hite that he hadn't eaten for about three days (Tr.375). He was emotional, shaky and teary (Tr.379).

Kenny gave a statement to Earnest and Highway Patrolman Ripley. Kenny never denied killing the Mennings, and he was completely cooperative throughout the interview (Tr.417, 420). Initially, Kenny's recollection was poor, and he recalled seeing only bloody faces, but he was able to recall more after he was told that a maul handle was used (Tr.410). Several times during the interview, Kenny wondered aloud, "why did I do this?" (Tr.426). He stated that he loved the Mennings and did not understand why he would hurt them (Tr.427). At times during the interview, Kenny had tears in his eyes or cried (Tr.432). Kenny agreed to give a videotaped statement (Tr.673). He told the police where his van was, and he consented to a search of it (Tr.370, 372, 713).

Kenny Escapes, then is Convicted

Kenny was held in custody at the Benton County Jail, which was built as a bank in the 1800's (Tr.750,585). About a year after the events, he and five other inmates escaped from the jail (Tr.571). The escapees jimmied the lock on the cell door and a door leading to a closet, where they were able to climb onto the top of the cells, scrape a hole through the bricks and mortar, and drop to the ground outside the jail (Tr.572).

The police learned that Kenny and two of the other escapees were at a motel in Blue Springs (Tr.576). The three were returned to custody without

incident (Tr.576-77,755). Prior to the escape, Kenny had been a good inmate (Tr.570,751).

Kenny was then housed at the Dallas County Jail (Tr.735). He allegedly told a guard that he would escape again if he got the chance (Tr.735). Kenny did not cause any problems and did not make any effort to escape (736,891).

In December, 1997, Kenny was convicted of first-degree murder for the deaths of Arlene and Clarence Menning and was sentenced to death (L.F.31-32). This Court affirmed the convictions but remanded for a new sentencing trial (L.F.47-70).

Kenny's Life at Potosi

From December, 1997 to about January, 2001, Kenny was incarcerated at the Potosi Correctional Center, was housed in the honor dorm, and worked his way up through several jobs (Tr.809). The honor dorm has strict criteria, which Kenny met for the vast bulk of the time he was awaiting retrial (Tr.808,827-28).[3] If an inmate had more than one minor conduct violation in a year, he would be kicked out of the honor dorm (Tr.812). Kenny had the best possible institutional adjustment score (Tr.810). He was very quiet, respectful, easy to deal with, was not verbally or physically aggressive, and got along well with prison employees and other inmates (Tr.820-21,829).

[3] Kenny was in the honor dorm for three years (Tr.827-28). He was at Potosi for about three years and two months (L.F. 31-32;Tr.1).

For about nineteen months, Kenny worked in the kitchen's vegetable room, helping prepare salads and chop vegetables (Tr.874,945). The vegetable room is a higher-paying job, reserved for better workers (Tr.946). Kenny and the two or three other inmates in the vegetable room used knives padlocked to the table by a cable (Tr.875). Kenny was a valuable, hardworking employee, who was respectful to others, obedient, and got along with everyone (Tr.876,886-87,950). He never had any problems, he followed the rules, and he volunteered to do other jobs, like scrubbing or painting (Tr.875-76,951).

Next, Kenny worked in the laundry room and progressed up through several jobs there (Tr.848). He was an excellent worker, who quietly got his job done, never made excuses to get out of work, and would help out in a pinch (Tr.851,855). Kenny was never disrespectful to his supervisor or co-workers and never fought (Tr.854). He had access to items that other inmates did not, such as scissors and needles; his supervisor trusted him with those items, and Kenny never abused that trust (Tr.856-57). Kenny was selected by his fellow workers and supervisor as laundry worker of the month (Tr.852-53).

During the seven months prior to the sentencing re-trial, Kenny worked in "industry," making student desks (Tr.942). Kenny was trusted with shop tools and metal working machines (Tr.942). He had no problems (Tr.943).

Kenny was also on the "haz-mat" team, which is comprised of three volunteers who are known to be good workers (Tr.936-37). The team is called in to clean up spills that the dorm workers do not want to clean up, such as blood,

urine, and feces (Tr.936). The haz-mat team is escorted to each spill and supervised while getting their cleaning supplies, such as bleach, that are off limits to other inmates (Tr.941,943). The team goes into areas, such as administrative segregation and the infirmary, where other inmates are not allowed (Tr.941).

Kenny was a good member of the team (Tr.939). He did what he was told even though the jobs were unpleasant (Tr.940). He was always respectful and never had any problems (Tr.940).

In his three years at Potosi, Kenny received three conduct violations--all of them minor: (1) theft of three pounds of hamburger and one pound of cheese; (2) theft of a cooler, which his prior cellmate had left behind by accident; and (3) interfering with count, disobeying an order and causing a disturbance, for failing to sit or stand while one of at least seven daily counts was conducted (he was lying on his bed) (Tr.819-22,836,838,960,970;Ex.W).

The Sentencing Re-Trial

The sentencing re-trial started on January 17, 2001 (Tr.1). During voir dire, the State asked the panel whether anyone would have trouble sentencing someone to death because of their personal views (Tr.161). Venireperson Mathews responded that she had a doubt as to whether she would be able to sentence someone to death, but could follow the four-step process and possibly impose the death penalty (Tr.161-62,188-89,191). Over defense counsel's objection, the court struck Mathews for cause (Tr.193-94).

During the trial, the State presented the testimony of two blood-stain analysis experts (Tr.591-629;632-647). Defense counsel argued that the testimony was irrelevant and that the testimony of both witnesses was cumulative (Tr.215-21,563-67,591,596,630-32). The court noted that the "cumulative" objection was probably well-taken, but overruled both objections anyway (Tr.222,566-67).

Defense counsel objected to a number of the State's photographic exhibits on the ground that they were irrelevant, cumulative and excessively prejudicial (Tr.460-82). The court overruled the vast majority of the objections (Tr.460-82). The State displayed a crime-scene videotape and 44 photographs showing the victims in bed or during the autopsy (Tr.491-92,497-98,500-505,535-38,599-618,637-41,775-82).

The State offered Ex.89, containing, in part, an ex parte order of protection that Kenny's ex-wife Linda had obtained against him (Tr.715-16). The defense objected on the ground that the exhibit contained hearsay and was irrelevant (Tr.714-15,717-18,724). The court held that because the exhibit was merely certified copies of the action of the circuit court, it was admissible, but it would not be passed to the jury (Tr.716, 719). In open court, the State then moved "for the admission of State's Exhibit 89 which is a certified copy of a file from Pettis County, Cause No. CV491-802DR, entitled Linda Hiller versus Kenneth Thompson, containing an ex parte order against Kenneth Thompson" (Tr.727). The court admitted the exhibit (Tr.727).

The State presented testimony from Tracey that Kenny was abusive and controlling (Tr.247,326). Defense counsel wished to elicit, as mitigating evidence, that Kenny also sacrificed a great deal for Tracey and that Kenny even agreed to move to South Dakota with Tracey when Tracey fled Missouri to avoid bad check charges (Tr.318-19). The court sustained the State's objection (Tr.321).

The State presented detailed testimony as to how Kenny was able to escape from the Benton County Jail (Tr.570-77,751-53,755-58). The court let the State elicit from Sheriff Spencer that Kenny admitted to him that "[Kenny] was the one that jimmied the locks to get out of the cell and into the sally port area" (Tr.758). The court had previously suppressed this statement, based on the State's promise that because Kenny made the statement without having been read his rights, the State would not use it against him (1st Tr.819-20).

In closing, the State argued that Clarence and Arlene were calling for justice and that the purpose of sentencing was solely to achieve justice for the victims (Tr.1012-13,1018-19,1027,1053). The State argued that Kenny took every right that the victims ever had and that the victims had no opportunity to ask for mercy or justice (Tr.1012,1052-53). It argued that Kenny was the Mennings' judge, jury and executioner (Tr.1052). Defense counsel did not object to these arguments, but objected to the State's argument that by presenting Kenny's certificate of laundry worker of the month, Kenny was "building a case" (Tr.1055). The court overruled the objection (Tr.1055).

The court instructed the jury to consider three aggravating circumstances as to each murder count:

(1) whether each murder was committed during another unlawful homicide;

(2) whether each murder involved depravity of mind by Kenny's alleged repeated and excessive acts of physical abuse upon the victims;

(3) whether each murder was committed while Kenny engaged in the perpetration of rape.

(L.F.245-46). Overruling defense counsel's objections to the third aggravator—that the jury at the first trial had rejected it—the court submitted the aggravator to the jury (L.F.236-38,245-46;Tr.923,929).

Defense counsel objected that Instructions No.10 and 15 failed to instruct the jury that if, after finding at least one statutory aggravating circumstance, each juror determined that the mitigating circumstances outweighed the aggravating circumstances, the jury must sentence the defendant to a term of life imprisonment without probation or parole (LWOP)(Tr.929). The court overruled the objection and submitted the instructions to the jury (Tr.931).

The Verdicts--Life, Deadlocked, Death

About two hours into deliberations, the jury sent a note to the judge, "We just found out that one of our jurors does not believe in imposing the death

penalty" (Tr.1061). The jury next sent a message that it had reached a verdict; then another message that it needed a few more minutes (Tr.1060-61).

The jury returned to the courtroom with verdicts of life on both counts (Tr.1066). The court polled the jury, asking each juror if that was "your verdict" (Tr.1067). Although one juror, George Meyer, indicated that it was his verdict, the other jurors stated that it was not his or her verdict (Tr.1067-68).
The court refused to accept the verdict and sent the jurors to deliberate further without offering the jury any further instruction or questioning the jury further (Tr.1069-70).

Shortly after receiving the new verdict forms, the jury returned to the courtroom and indicated, on both counts, it was unable to agree upon punishment (Tr.1072-73). The court polled the jury once again, and each juror stated that it was his verdict (Tr.1073-75). Defense counsel asked that the jurors be polled to determine if they unanimously found at least one aggravator for each count and if they unanimously decided that the aggravators warranted imposition of the death penalty (Tr.1076-77). The court accepted the verdicts without further inquiry (Tr.1077).

The court found the State had proven two aggravators beyond a reasonable doubt: each of the murders was committed during another unlawful homicide; and each murder was committed while Kenny was engaged in the perpetration of rape (Tr.1079-80). The court assessed punishment as death (Tr.1080).

At sentencing, the defense presented the affidavit of juror Meyer (Tr.1083-87;L.F.351-52). Meyer explained that the jury had unanimously agreed that the State had proven the existence of at least one aggravating circumstance beyond a reasonable doubt, but that he could not conclude that the aggravating factors warranted the death penalty (L.F.351). Because the jury lacked unanimity as to this step, it believed that it had to return a sentence of life imprisonment (L.F.351). He explained that when the court sent the jurors back to deliberate further, they were confused as to why the verdicts were not accepted (L.F.351-52). They concluded that because they lacked unanimity in the initial polling question, the verdict form indicating that the jury could not agree upon punishment was the appropriate form (L.F.352). The court refused to consider Meyer's affidavit on the ground that it impeached the verdict (Tr.1087).

The court overruled the motion for new sentencing trial and sentenced Kenny to death on both counts (Tr.1090). Notice of Appeal was timely filed (L.F.365).

POINT I

The trial court abused its discretion in rejecting the jury's initial verdict of life imprisonment, or in the alternative, failing to conduct an inquiry to determine the reason that the jury returned its verdict of life imprisonment and the point at which the jurors lacked unanimity, because the court's actions denied Kenny the right to a fair trial, due process, freedom from double jeopardy, freedom from cruel and unusual punishment, and to be sentenced by a jury of his peers, U.S.Const. Amends.V,VI,VIII,XIV, Mo.Const., Art. I, §§10,18(a),19,21, and §565.030, in that (1) the jurors returned a proper verdict of life imprisonment; (2) due to its own lack of understanding, the court rejected the verdict and sent the jurors to deliberate further without providing further instruction to the jury; and (3) the court's actions led the jurors to believe that their first verdict must be improper, thereby effectively coercing them to return a "deadlocked verdict" because that was the only possible verdict in light of the court's actions.

Price v. North Carolina, 512 U.S. 1249 (1994);

Carter v. Bowersox, 265 F.3d 705 (8th Cir.2001);

State v. Sandles, 740 S.W.2d 169 (Mo.1987);

Washburn v. Grundy Elec. Co-op., 804 S.W.2d 424 (Mo. App. 1991);

U.S.Const. Amends.V,VI,VIII,XIV;

Mo.Const., Art. I, §§10,18(a),19,21;

§565.030.

POINT II

The trial court abused its discretion in admitting State's Ex.89 as evidence that the Circuit Court of Pettis County had issued an order of protection to Kenny's ex-wife against Kenny. The exhibit was not relevant--it was entirely inconclusive as to whether Kenny had committed bad acts against Linda and did not shed light on Kenny's character, because the order of protection was effectively nullified when the Circuit Court dismissed the proceeding and assessed costs against Linda. The State committed prosecutorial misconduct by presenting the ex parte order of protection as a final decree, and reading only a selected portion of the exhibit to the jury when other portions showed that the proceeding was dismissed without a hearing and costs were assessed against Linda. The improperly admitted evidence violated Kenny's rights to confront and cross-examine the witnesses against him, to a fair trial, to due process, and to be free from cruel and unusual punishment. U.S.Const., Amends V,VI,VIII,XIV; Mo.Const., Art. I, §§10,18(a),21. Kenny was prejudiced, because the sentencer was improperly led to believe that a court had held a hearing and made a finding that Kenny had committed violence or misconduct sufficient to warrant an order of protection.

Ohio v. Roberts, 448 U.S. 56 (1980);

State v. Debler, 856 S.W.2d 641 (Mo.1993);

Gardner v. Florida, 430 U.S.349 (1977);

People v. Bedoya, 758 N.E.2d 366 (Ill.App.Dist. 2001);

U.S.Const., Amends V,VI,VIII,XIV;

Mo.Const., Art. I, §§10,18(a),21.

POINT III

The trial court abused its discretion in letting the State present testimony through Prine and VanStraten that Arlene Menning moved either during or after the assault, because (1) any marginal relevance of the testimony was outweighed by its prejudicial effect; and (2) the testimony of the witnesses was cumulative, thereby violating Kenny's rights to a fair trial, to due process, and to be free from cruel and unusual punishment. U.S. Const., Amends.V,VI,VIII,XIV; Mo. Const., Art. I, Secs.10,18(a),21. Kenny was prejudiced, because the jury was bombarded with gruesome photographs and repeated discussion of how the victims' blood flew, flowed, dripped and spattered, thereby distracting the jury and improperly inflaming their passions.

State v. Driscoll, 55 S.W.3d 350 (Mo.2001);

State v. Seever, 733 S.W.2d 438 (Mo.1987);

State v. Cole, 867 S.W.2d 685 (Mo.App.1993);

U.S. Const., Amends.V,VI,VIII,XIV;

Mo. Const., Art. I, Secs.10,18(a),21.

POINT IV

The trial court abused its discretion in admitting State's Exs.37,43,80, 84,85,86,88,95,97, because admitting the cumulative, irrelevant and highly prejudicial photographs violated Kenny's rights to due process, a fair trial before a fair/impartial jury and freedom from cruel and unusual punishment, U.S.Const., Amends. V,VI,VIII,XIV; Mo.Const., Art.I, Secs.10,18(a),21, in that:

(1) 95 was cumulative to 35 – both depicted the Mennings from the same view – the only difference was that 95 was slightly closer-up;

(2) 37 was cumulative to 93 – both depicted the Mennings from the same view, with a focus on Clarence – the only difference was that 37 was slightly closer-up;

(3) 43, depicting Clarence's bloody head, bloody wall and headboard, was cumulative to Exs.37,38,39,40,41,47,93;

(4) 80 (Clarence) and 88 (Arlene) - autopsy photographs showing scalp peeled back- were cumulative to three other exhibits; and

(5) 84, 85, 86, 97 – four autopsy photographs showing the same wounds to Arlene's head - were irrelevant, cumulative, and prejudicial.

Kenny was prejudiced because the photographs invited a sentence based on passion and prejudice, making Kenny's death sentence inherently unreliable.

Thompson v. Oklahoma, 487 U.S. 815 (1988);

State v. Floyd, 360 S.W.2d 630 (Mo.1962);

State v. Green, 603 S.W.2d 50 (Mo.App.1980);

U.S.Const., Amends. V,VI,VIII,XIV;

Mo.Const., Art.I, §§10,18(a),21.

POINT V

The trial court abused its discretion in sustaining the State's objection and barring defense counsel from eliciting evidence to defend against the State's death prosecution--that Tracey and Kenny moved to South Dakota so Tracey could avoid being picked up on bad check charges--to rebut and defend against the State's evidence that Kenny was cruel and controlling by showing how much he was willing to sacrifice for her and the extent to which he would go to protect their relationship. The court's refusal to allow the defense to present the mitigating evidence denied Kenny his right to a fair trial, to due process, and freedom from cruel and unusual punishment. U.S.Const., Amends. V,VI,VIII,XIV; Mo.Const., Art. I, §§10,18(a),21. The testimony was very key, relevant mitigating evidence that the defense was entitled to present and the sentencer was entitled and indeed required to consider in the capital sentencing trial.

Lockett v. Ohio, 438 U.S. 586 (1978);

Gardner v. Florida, 430 U.S. 349 (1977);

State v. Deck, 994 S.W.2d 527 (Mo.1999);

State v. Debler, 856 S.W.2d 641 (Mo.1993);

U.S.Const., Amends. V,VI,VIII,XIV;

Mo.Const., Art. I, §§10,18(a),21.

POINT VI

The trial court abused its discretion in allowing the State to elicit from Sheriff Spencer, over defense counsel's objection, that Kenny jimmied the locks to get out of the cell, because the testimony violated Kenny's rights to due process, a fair trial, and freedom from compelled self-incrimination and cruel and unusual punishment. U.S.Const., Amends. V,VI,XIV; Mo.Const., Art. I, §§10,18(a),19,21. Kenny was prejudiced, since the only basis for Spencer's knowledge was a statement that Kenny made without being Mirandized; the State had previously agreed not to use the statement; defense counsel did not open the door to the testimony simply by asking if Kenny had committed any violence during the escape; and the State used the testimony to further emphasize that Kenny was a great escape-risk who must get the death penalty so he would not escape again.

Miranda v. Arizona, 384, 436 (1966);

Simmons v. U.S., 390 U.S. 392 (1968);

State v. Samuels, 965 S.W.2d 913 (Mo.App.1998);

State v. Whitfield, 837 S.W.2d 503 (Mo.1992);

U.S.Const., Amends.V,VI,XIV;

Mo.Const., Art. I, §§10,18(a),19,21.

POINT VII

The trial court abused its discretion during closing in overruling Kenny's objection to the State's comment that Kenny was merely "building a case" by presenting evidence that he was voted as the laundry worker of the month, and plainly erred in letting the State make comments that set the jury forth as the voice of the victims; misstated the goal of a capital sentencing as solely to obtain justice for the victims; urged the jury to ignore mitigating evidence; and compared the rights of the victims to Kenny's rights at the sentencing trial. The State's repeated violations during closing deprived Kenny of his rights to due process, a trial before a fair/impartial jury, and freedom from cruel and unusual punishment. U.S.Const., Amends. V,VI,VIII,XIV; Mo.Const., Art.I,§§10,18(a),21. The arguments constituted improper personalization and misstatement of the law and penalized Kenny for exercising his constitutional rights. The trial court's approval of these improper arguments prejudiced Kenny and affected the outcome of the trial by (1) allowing the State to skew the jury's view of how mitigation evidence should be evaluated, (2) allowing the State to urge the jury to abdicate its role as impartial fact-finder and to consider Kenny's constitutional rights as an aggravating factor against him, and (3) erroneously considering, itself, the State's improper arguments in sentencing Kenny to death.

Woodson v. North Carolina, 428 U.S. 280 (1976);

Lockett v. Ohio, 438 U.S. 586 (1978);

Skipper v. South Carolina, 476 U.S. 1 (1987);

State v. Simmons, 955 S.W.2d 729 (Mo.1997);

U.S.Const., Amends. V,VI,VIII,XIV;

Mo.Const., Art.I,§§10,18(a),21.

POINT VIII

The trial court abused its discretion in sustaining the State's strike for cause of venireperson Mathews because the ruling deprived Kenny of his rights to due process, a fair and impartial jury, and freedom from cruel and unusual punishment. U.S.Const., Amends.V,VI,VIII,XIV; Mo.Const., §§10,18(a),21. Mathews stated that she would find it difficult to sentence someone to death, but thought that she would be able to follow the instructions and consider the death penalty and thus she was qualified to serve on the jury.

Adams v. Texas, 448 U.S. 38 (1980);

Gray v. Mississippi, 481 U.S. 648 (1987);

Wainwright v. Witt, 469 U.S. 412 (1985);

Boulden v. Holman, 394 U.S. 478 (1969);

U.S.Const., Amends.V,VI,VIII,XIV;

Mo.Const., §§10,18(a),21.

POINT IX

The trial court erred in denying Kenny's motions to strike the "rape aggravator" under Section 565.032.2(11) pled by the state on both murder counts, in overruling Kenny's objections, and in submitting to the jury Instructions No. 6 and 11 (MAI-CR3d 313.40) which included this statutory aggravating circumstance, and further erred in considering this aggravator in sentencing Kenny to death. This violated Kenny's rights to due process of law and a fair jury trial, to not be twice placed in jeopardy and to reliable sentencing and freedom from cruel and unusual punishment. U.S.Const., Amends. V,VI,VIII,XIV; Mo.Const., Art. I, §§10,18(a),19,21. Kenny was prejudiced, because neither the jury nor judge should have considered the aggravator after another jury had been unable to find the aggravator beyond a reasonable doubt.

Apprendi v. New Jersey, 530 U.S. 466 (2000);

Jones v. United States, 526 U.S. 227 (1999);

Bullington v. Missouri, 451 U.S. 430 (1981);

Ashe v. Swenson, 397 U.S. 436 (1970);

U.S.Const., Amends.V,VI,VIII,XIV;

Mo.Const., Art. I, §§10,18(a),19,21;

MAI-CR3d 313.40.

POINT X

The trial court plainly erred in failing to declare a mistrial or impose a sentence of life imprisonment, because (1) the State failed to include in the information or first amended information the aggravating circumstance/s that the State would rely on and prove beyond a reasonable doubt to obtain a conviction of the offense of "aggravated" first-degree murder; and (2) the jury, not the judge, was the fact-finder and was responsible for determining whether the State had proven an aggravating circumstance beyond a reasonable doubt, so as to make Kenny eligible for the death penalty. The court's assumption of the jury's role in assessing sentence and its imposition of the death penalty, without having charged Kenny with "aggravated" first-degree murder, violated Kenny's rights to due process, a fair trial, and freedom from cruel and unusual punishment. U.S.Const., Amends. V,VI,VIII,XIV; Mo.Const., Art. I, §§2,10,17,18(a),21. Kenny was prejudiced, because he was sentenced for a crime that was not alleged in the information and was denied his right to have a jury of his peers determine if he was guilty of "aggravated" first-degree murder. To the extent that Section 565.030.4(4) allows the court to find the aggravating circumstance/s in the event of a hung jury, it is unconstitutional.

Apprendi v. New Jersey, 530 U.S. 466 (2000);

Jones v. United States, 526 U.S. 227 (1997);

State v. Parkhurst**,** 845 S.W.2d 31 (Mo.1992);

State v. Stringer, 36 S.W.3d 821 (Mo.App.2001);

U.S.Const., Amends.V,VI,VIII,XIV;

Mo. Const., Art. I, §§2,10,17,18(a),21;

§565.030.

POINT XI

The trial court erred in overruling Kenny's objections and submitting to the jury Instructions No. 10 and 15 (MAI-CR3d 313.48A), because submission of the instructions violated Kenny's rights to due process, a fair jury trial, and freedom from cruel and unusual punishment. U.S.Const., Amends. V,VI,VIII,XIV; Mo.Const., Art. I, §§10,18(a),21. The instructions gave the jury directions for reaching a verdict, yet failed to comply with the substantive law, §565.030.4(3), by failing to include the "third step" of the deliberation process – that if, after finding at least one statutory aggravating circumstance, each juror determined that the mitigating circumstances outweighed the aggravating circumstances, the jury must sentence the defendant to a term of life imprisonment without the possibility of probation or parole. The omission of a step mandated by statute prejudiced Kenny by misleading the jurors to think that they could ignore evidence of mitigating circumstances altogether, thereby lessening the State's burden of proof as to punishment.

Lockett v. Ohio, 438 U.S. 586 (1978);

Skipper v. South Carolina, 476 U.S. 1 (1986);

Boyde v. California, 494 U.S. 370 (1990);

Carter v. Bowersox, 265 F.3d 705 (8th Cir.2001);

U.S.Const., Amends.V,VI,VIII,XIV;

Mo.Const., Art. I, §§10,18(a),21;

§565.030;

MAI-CR3d 313.48A..

POINT XII

Kenny's death sentence is disproportionate under §565.035. Upholding the sentence would violate Kenny's rights to due process and to be free from cruel and unusual punishment. U.S.Const., Amends.V,VIII,XIV; Mo.Const., Art.I, §§10, 21. Kenny's sentence was the result of many arbitrary factors and of passion and prejudice. The sentence of death is disproportionate to the penalty imposed in similar cases.

Cooper Industries v. Leatherman Tool Group Inc., 532 U.S. 424 (2001);

State v. McIlvoy, 629 S.W.2d 333 (Mo.1982);

State v. Holcomb, 956 S.W.2d 286 (Mo.App.1997);

State v. Dulany, 781 S.W.2d 52 (Mo.1989);

U.S.Const., Amends.V,VIII,XIV;

Mo.Const., Art.I, §§10, 21;

§565.035.

ARGUMENT I

The trial court abused its discretion in rejecting the jury's initial verdict of life imprisonment, or in the alternative, failing to conduct an inquiry to determine the reason that the jury returned its verdict of life imprisonment and the point at which the jurors lacked unanimity, because the court's actions denied Kenny the right to a fair trial, due process, freedom from double jeopardy, freedom from cruel and unusual punishment, and to be sentenced by a jury of his peers, U.S.Const. Amends.V,VI,VIII,XIV, Mo.Const., Art. I, §§10,18(a),19,21, and §565.030, in that (1) the jurors returned a proper verdict of life imprisonment; (2) due to its own lack of understanding, the court rejected the verdict and sent the jurors to deliberate further without providing further instruction to the jury; and (3) the court's actions led the jurors to believe that their first verdict must be improper, thereby effectively coercing them to return a "deadlocked verdict" because that was the only possible verdict in light of the court's actions.

When this Court granted Kenny a new sentencing trial, he fully expected that the jury would assess his punishment. And the jury did, in fact, do so--it returned with a verdict of life imprisonment without the possibility of probation or parole (LWOP). Yet the trial court summarily rejected the jury's verdict and sent the jurors back to deliberate further without providing the jury any clarification of the supposed "problem" with its verdict. Believing that they could not return the

same verdict again, the jurors returned a verdict that they were deadlocked. The court thereby commandeered the jury's duty to assess punishment and then imposed a death sentence--the only verdict that the jury never even attempted to render.

I. The Verdict of LWOP Was Entirely Proper

A. The Instructions Warranted a Verdict of LWOP

Prior to the start of death qualification, the court instructed, "if the jury does find at least one statutory aggravating circumstance it still cannot return a sentence of death unless it also unanimously finds that the evidence in aggravation of punishment taken as a whole warrants the death penalty and that this evidence is not outweighed by evidence in mitigation of punishment" (Tr.155, emphasis added).

Prior to the jury's deliberations, the court again instructed the jury:

> If you do not unanimously find from the evidence that the facts and circumstances in aggravation of punishment warrant the imposition of death as defendant's punishment, you must return a verdict fixing his punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

(L.F.247,254). And again, the court instructed:

> If you are unable to unanimously find the existence of at least one statutory aggravating circumstance beyond a reasonable doubt, as submitted in Instruction No. 6, or if you are unable to unanimously find that there are facts

and circumstances in aggravation of punishment which warrant the imposition of a sentence of death, as submitted in Instruction No. 7, then your foreperson must sign the verdict form fixing the punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

(L.F.247,250,254,257, emphasis added).[4]

B. The Deliberations and Verdict

About two hours into deliberations, the jury sent a note to the judge stating, "We just found out that one of our jurors does not believe in imposing the death penalty" (Tr.1061). The jury then sent a message that it had reached a verdict; and then another message that it needed a few more minutes (Tr.1060-61).

The jury returned to the courtroom with verdicts of LWOP on both counts (Tr.1066). The court then polled the jury, asking each juror if that was "your verdict" (Tr.1067). Although the first juror, George Meyer, indicated that it was his verdict, the other jurors stated that it was not his or her verdict (Tr.1067-68).

Initially, the State asked that the case be mistried, but then asked that the jurors be sent to deliberate further (Tr.1068). Defense counsel argued that the verdict of LWOP was proper, and that the jurors indicated in the polling merely that they lacked unanimity on one of the four steps in their deliberations (Tr.1069). The court responded that it either was or was not the jury's verdict (Tr.1069). The

[4] The court provided the same instruction for count II.

court refused to accept the verdict and sent the jurors to deliberate further without offering any further instruction or questioning the jury further (Tr.1069-70).

C. The Second "Verdict"

About fifteen minutes after receiving the new verdict forms, the jury returned to the courtroom (Tr.1072). On both counts, the jury indicated it was unable to agree upon the punishment (Tr.1072-73). The court polled the jury once again, and each juror stated that it was his verdict (Tr.1073-75). When the court asked the foreperson for the reason for the change, she responded:

> We misunderstood as far as unanimously agreeing upon a verdict. What we understood was that if we did not agree on one then we would have to vote the other way. But we were not all in agreement of the other verdict so we misunderstood. And we decided with that misunderstanding that we would, because we could not agree on a decision unanimously, that we would give it to the Court.

(Tr.1075-76).

Due to the ambiguity in the response, defense counsel asked that the jurors be polled: (1) Did they unanimously find at least one aggravator for each count? If so, then (2) Did they unanimously decide that the aggravators warranted imposition of the death penalty? If so, then (3) Did the jury find factors in mitigation that outweighed the factors in aggravation? (Tr.1076-77). The State argued that, "to invade the deliberation of the jury any more would be improper" (Tr.1077). The court refused to make any further inquiry (Tr.1077).

D. Affidavit by Juror Meyer

Prior to sentencing, defense counsel contacted Juror Meyer, who had initially stated that his verdict was LWOP. In an affidavit, Meyer explained that he believed that the death penalty is appropriate in some situations, and that, in such cases, he could vote for death and sign the verdict form (L.F.351;Appendix). He explained that the jury had unanimously agreed that the State had proven the existence of at least one aggravating circumstance beyond a reasonable doubt (L.F.351;Appendix). He then explained:

> After considering all of the evidence that was presented in Mr. Thompson's case, I found that I was unable to conclude beyond a reasonable doubt that the facts and circumstances in aggravation of punishment, taken as a whole, warranted the imposition of a sentence of death upon Mr. Thompson, for either of the two counts of murder in the first degree that Mr. Thompson stood convicted of. I expressed this conclusion to the rest of the jurors, and we were therefore not unanimous as to this "step."

(L.F.351:Appendix). Meyer explained that the jury initially returned the LWOP verdict because of his position and the belief of the jury that if they were not unanimous as to this step, the sentence recommendation must be LWOP (L.F.351;Appendix). He explained that when the court sent the jurors to deliberate further, they were confused as to why the verdicts were not accepted (L.F.351-52:Appendix). The jurors concluded that "because we appeared to lack unanimity in answering the initial polling question, the verdict form indicating that the jury

could not agree upon punishment was the appropriate form, which is the verdict we ultimately returned" (L.F.352:Appendix). Meyer asserted that he never altered his belief that the State did not prove beyond a reasonable doubt that the aggravating circumstances, taken as a whole, warranted the death penalty (L.F.352;Appendix).

The court barred defense counsel from contacting any other juror (Tr.1086). It refused to consider Meyer's affidavit on the ground that it impeached the verdict (Tr.1087).

E. The Issue is Fully Preserved for Appeal

Defense counsel preserved this issue for appeal by including it in the motion for new trial (L.F.305-308). It should be reviewed under an abuse of discretion standard. Although we must rely on the sound discretion of the trial judge, the exercise of that discretion may be disturbed on appeal when the record shows a manifest abuse of discretion. State v. Lee, 654 S.W.2d 876, 879 (Mo. 1983).

II. This Court Must Give Effect to the Jury's Verdict of LWOP

This Court must find that a verdict of LWOP is valid when (1) the verdict is valid on its face; (2) the verdict can be interpreted as valid under a legitimate reading of the law and instructions; and (3) neither the court nor the State rebut the presumption of correctness by ascertaining that the verdict clearly is not proper. After all, bedrock Missouri precedent establishes that appellate courts must

presume that the jury understood the instructions and knew what it was doing when it returned its verdict. The LWOP verdicts were valid under the instructions and make perfect sense in light of the events that transpired immediately prior to the return of the verdicts and the affidavit by Juror Meyer.

A. Section 565.030 Mandates a Verdict of LWOP if the Jurors Lack Unanimity in the First Two Steps of Deliberation

Section 565.030 mandates that the jury return a verdict of LWOP if:

(1) it does not find beyond a reasonable doubt at least one statutory aggravating circumstance; or

(2) it does not find that the evidence in aggravation of punishment warrants a death sentence; or

(3) it concludes that the evidence in mitigation outweighs the evidence in aggravation; or

(4) it decides under all the circumstances not to assess a death sentence.

Any lack of unanimity regarding steps (1) and (2) mandates a verdict of LWOP. *See* MAI-CR3d 300.03, 313.41A; s*ee also* State v. Ramsey, 864 S.W.2d 320, 337 (Mo.1993); State v. Whitfield, 837 S.W.2d 503, 515 (Mo.1992).

B. We Must Presume that the Jury Followed the Instructions

This Court has repeatedly held that appellate courts must presume that juries follow the instructions and understand the words used in the instructions

when they arrive at their verdict. State v. Shurn, 866 S.W.2d 447, 465 (Mo.1993); State v. Lay, 427 S.W.2d 394, 400 (Mo.1968).

In State v. Sandles, 740 S.W.2d 169, 171 (Mo.1987), the jury returned a verdict that it was unable to decide on punishment. The defendant alleged that he should receive a new trial because the verdict form did not require the foreman to disclose the aggravating circumstances found by the jury beyond a reasonable doubt. *Id*. This Court held that there was no reason to believe that the jury failed to follow the instruction that it must return a verdict of LWOP if it did not find at least one aggravating factor. *Id*.,179; *see also* State v. Smith, 944 S.W.2d 901, 919-20 (Mo.1997).

So, too, in Six v. Delo, 94 F.3d 469 (8th Cir. 1996), the jury found Six guilty of first-degree murder, but returned a verdict that it could not agree on punishment. Six argued that the court erred in failing to poll the jurors as to the aggravating circumstances it found before it reported that it was deadlocked. *Id*.,475. The federal court held that the trial court was not required to poll the jury, because the jury could not return its "deadlocked" verdict unless it had already unanimously found an aggravating circumstance. *Id*. The federal court stressed that it must presume that the jury followed the instructions to that effect. *Id*.

Kenny's jurors were instructed repeatedly that if they were unable to unanimously find that the facts in aggravation of punishment warranted the imposition of a sentence of death, they must return a verdict of LWOP (Tr.155; L.F.247,250, 254,257). The trial court had no reason to doubt the jury's ability to

follow these instructions, yet it rejected the verdict without questioning the jury on the basis for its lack of unanimity while returning its verdict of LWOP.

C. The Jury Understood that it Was Required to Give LWOP

About two hours into deliberations, the jury sent a note to the judge stating, "We just found out that one of our jurors does not believe in imposing the death penalty" (Tr.1061). The jury then sent a message that it had reached a verdict; and then another message that it needed a few more minutes (Tr.1060-61). The jury returned to the courtroom with verdicts of LWOP on both counts (Tr.1066).

The jury understood perfectly well that if it could not unanimously find that the facts in aggravation warranted the death penalty, it was required to return a verdict of LWOP (L.F.250, 257). When Meyer expressed that he felt that the aggravating facts did not warrant the death penalty, the jurors sent the note to the court (Tr.1061). Before the court could respond, however, the jurors determined for themselves that, under the instructions, their lack of unanimity mandated a LWOP verdict (Tr.1060-61). And thus, just minutes later, the jury returned with its verdicts of LWOP (Tr.1066).

D. Meyer's Affidavit Supports the Verdict

Meyer's affidavit conclusively demonstrates that the LWOP verdicts were valid. Meyer explained that he was unable to conclude that the facts in aggravation warranted the death penalty (L.F.351). Based on the lack of unanimity on this step of the instructions, the jurors understood that they were

required to return a verdict of LWOP (L.F.351). This verdict comports entirely with the instructions.

Missouri courts have steadfastly maintained that a juror may give an affidavit to support a verdict, though not to destroy it. *See* Washburn v. Grundy Elec. Co-op., 804 S.W.2d 424, 431 (Mo. App. 1991); State v. Perry, 643 S.W.2d 58, 61 (Mo. App. 1983); Chrum v. St. Louis Public Service Co., 242 S.W.2d 54, 56 (Mo.1951); State v. Westmoreland, 126 S.W.2d 202, 204 (Mo.1939). Meyer's affidavit proves that which well-established Missouri precedent already demands must be presumed--that the jurors knew what they were doing and initially returned a proper verdict. It also serves as an offer of proof as to what the jurors would have communicated to the court if the court had questioned the jurors further as defense counsel requested.

In addition, the affidavit may be considered by the Court to clarify its understanding of the jury's note to the court and the foreperson's response to the court's query as to the lack of unanimity regarding the first verdict. In Hooks v. State of Oklahoma, 19 P.3d 294 (Okla.Crim.App.2001), the defendant referred to a news article in which one juror commented on the reasoning of the one hold-out juror. The appellate court found that "the statement could not be used to challenge the verdict but we consider it to clarify our understanding of the jury's note." *Id*., at 312, fn. 34.

E. The Judge Jumped to the Wrong Conclusion

After the jury was polled, defense counsel argued that LWOP was the jury's verdict and started to explain that the juror's answers to the polling question merely indicated that the jury was not unanimous on one of the steps of the instruction (Tr.1069). The court interrupted defense counsel mid-sentence and stated, "No, it either is or is not their verdict. . . . I'm refusing to accept this. Obviously, this is not their verdict" (Tr.1069).

By stating that "it either is or is not their verdict," the court must have believed that the jury was required to return a unanimous verdict, or it could return no verdict at all. The court overlooked that the jury could return a verdict of LWOP without being unanimous. In fact, a verdict of LWOP is mandated when (1) the jurors cannot unanimously find the existence of an aggravator, or (2) the jurors cannot unanimously find that the aggravators warrant death.

The court must have presumed that the jurors had reached the third step of the instructions. In the third and fourth steps, a lack of unanimity would cause the "deadlocked" verdict. But the court had no grounds to make this presumption. Instead, the valid presumption would be that since the jurors returned a verdict of LWOP and are presumed to follow the instructions, the jurors must have lacked unanimity at step two. The Eighth Amendment prohibits the arbitrary and capricious imposition of the death penalty. But that is exactly what happened here when the court arbitrarily presumed that the jury had reached a step where it could validly deadlock.

III. If the Court Was Confused, It Had a Duty To Poll the Jury Further

The trial court has a duty to see that the verdicts are in proper form. State v. Dorsey, 706 S.W.2d 478, 480 (Mo.App.1986). Its failure to examine the verdict for defects, inconsistencies, and ambiguities may result in reversible error. *Id*. The trial court can resolve inconsistencies or ambiguities by returning the jury to further deliberations or by polling the jury. *Id*.

The right to poll the jury is a significant, substantial and undoubted right, even though it is not a constitutional right. United States v. Randle, 966 F.2d 1209, 1214 (7thCir.1992); Humphries v. District of Columbia, 174 U.S. 190, 194 (1899). The purpose of polling the jury is to ensure that each of the jurors approves of the verdict, and that the verdict was not caused by mistake. *Id.*,194; State v. Pockert, 746 P.2d 839 (Wash.Ct.App.1987).

This Court has held that when an inconsistency appears on the face of a single verdict, the court should ask the jury which aspect of the verdict is correct. State v. Peters, 855 S.W.2d 345, 348 (Mo. 1993). "If the verdict is ambiguous, the best way to clarify the message is to ask the sender of the message (the jury) what was meant." *Id*.

The polling questions needed to reach the heart of the matter in a capital sentencing phase are different from the sole question asked in a guilt phase proceeding. In any other criminal trial, unanimity is required before the jury may return a verdict. In a capital sentencing phase, however, a proper verdict can be reached despite the lack of unanimity. As a result, a polling question that fails to

account for each step in the process and that fails to account for the fact that a proper verdict may correctly reflect a lack of unanimity is inadequate in the context of capital sentencing.

In Price v. North Carolina, 512 U.S. 1249 (1994), Justice Blackmun recognized the confusion that can result from imprecise polling questions in capital sentencing trials. The jury was individually polled, "Is this your answer?" *Id*. The State Supreme Court interpreted the question as "Is this your own individual answer?" *Id*. The United States Supreme Court, however, recognized that it was "equally plausible" that a reasonable juror could have interpreted the question as "Is this your, *the jury's*, answer?" *Id*. Thus, an affirmative answer could mean either "Yes, that was our answer, because we could not achieve unanimity on the existence of that factor" or "Yes, that was my answer, but only because I could not get the others unanimously to agree that this mitigating circumstance existed." *Id*.

So too, here, the jurors could have understood the court's question of "is this your verdict?" to mean either, "is this the outcome you, personally, wanted?" or "is this the outcome you reached as a jury?" The proper inquiry would have been to ascertain which aggravating factor/s were found by the jury, and then to poll each juror as to whether he found the existence of that aggravating factor beyond a reasonable doubt; if one aggravating factor were so found, then question the jury as to whether each of the jurors found that the aggravating factor/s warranted imposition of the death penalty.

Missouri law allows the trial court to individually poll the jurors during the trial when it is warranted. For example, if a question arises as to whether the jury has been exposed during the trial to publicity adverse to the defendant, the court must determine if the publicity created a danger of substantial prejudice to the defendant; if it did, the court must then poll the jurors individually to determine whether they had in fact been exposed to the prejudicial information. State v. Stith, 660 S.W.2d 419, 424 (Mo. App. 1983).

So, too, the jury should have been individually questioned to determine if the first verdict was in fact a proper verdict. What harm would have transpired here by the judge individually questioning the jurors as to the point at which they lacked unanimity? The polling would not be lengthy, and it would have ensured that the verdict that the jury returned was proper. The entire reason for the capital sentencing phase was for the jury to assess punishment. The instructions themselves remind the jury that "under the law, it is the primary duty and responsibility of the jury to fix the punishment" (L.F.251,258). When the jury properly performed its duty, it was flagrantly wrong for the court to summarily reject the verdict and return the jury to deliberate further.

Other states routinely allow for more extensive polling of capital juries. In North Carolina, each juror is polled on the jury's findings of an aggravator; its rejection of all mitigators; its finding that the aggravator was sufficiently substantial to warrant the death penalty; and its recommendation of the death penalty. State v. Buchanan, 410 S.E.2d 832, 845-46 (N.C. 1991). In Tennessee,

each juror would be asked, individually and collectively, whether he imposed the death penalty after finding (1) that the aggravators were proven beyond a reasonable doubt, and (2) that the aggravators outweighed the mitigators. Terry v. State, 46 S.W.3d 147, 158 (Tenn. 2001). In Virginia, the jurors are polled to determine, in the least, if the aggravator was found by each of the jurors. *See, e.g.*, Bunch v. Thompson, 949 F.2d 1354, 1366 (4th Cir. 1991).

Missouri, too, should adopt a procedure for polling the jurors to ensure that the jurors have returned a proper verdict. We presume that the jurors understand the instructions and have followed the instructions when returning a verdict. A trial judge should not be allowed to summarily toss out the jurors' verdict without even conducting basic polling of the jurors to ascertain the jurors' intent. By failing to question the jurors further in this case, the court negated any reliability of the death sentences that were subsequently imposed by the court.

IV. The Jury Was Coerced, Not Truly Deadlocked

A. The Jury Had No Instruction and No Choice

After rejecting the jury's verdict of LWOP, the court gave the jury new verdict forms and sent them to deliberate further (Tr.1070). It provided absolutely no instruction to the jury on why it had rejected the verdict (Tr.1070). Just fifteen minutes after receiving the new verdict forms, the jury reported it was deadlocked (Tr.1072).

Apparently, the court was wary of providing any further instruction to the jurors to clarify why they were sent back to deliberate further. But by rejecting the verdict and sending the jury to deliberate further, after the polling appeared to reveal a seeming lack of agreement, the court sent a very strong, tacit, message to the jury--that LWOP is not possible if the jurors were in disagreement. This Court has recognized:

> When the trial judge refuses to accept a jury's verdict and resubmits the case, there is a danger that the jury will be unusually susceptible to reading into the judge's comments an inference that the judge, in rejecting their verdict, is looking for a particular result.

Peters, 855 S.W.2d at 349 (recommending that the court's instruction resubmitting the matter to the jury should be in writing and specifically advise the jury of the nature of the problem).

Here, the trial court provided absolutely no instruction to the jury; its lack of any comment communicated to the jury that it had done something "wrong" by returning LWOP verdicts when it was not in agreement. The jury had no option but to state it was deadlocked. Just fifteen minutes after it received the new verdict forms, it did so (Tr.1072). The foreman's ambiguous explanation as to why the jury had returned the LWOP verdicts did nothing to clarify the situation or diminish the fact that the jury felt that it was required to return the deadlocked verdict (Tr.1075-76). What the foreman's comments did make painfully clear was the folly of the court's refusal to query the jury to clarify that the jury had

followed the instructions.

B. Prior Cases Deal With Juries That Truly Were Deadlocked

Several Missouri cases have dealt with the issue of a deadlocked capital jury. *See, e.g*, Sandles and Six, *supra*. In State v. Griffin, 756 S.W.2d 475 (Mo.1988), the defendant requested that the court provide the "hammer instruction" to the jury after it indicated that it was unable to agree on punishment in a capital murder case. This Court stressed that Section 565.030.4 empowers the jury in capital sentencing phase to determine for itself when it is deadlocked, so the "hammer instruction" should not be given. *Id*.,486-87. The jury's decision that it could not agree on punishment was in fact its verdict. *Id*.,487. The Court stressed that the aim of the legislature was to prevent the jury from being coerced into reaching a "reluctant decision which would result in an arbitrary and capricious sentence." *Id*.

Unlike Griffin, the jury here returned the "verdict" that it could not agree on punishment, only after the court inexplicably rejected its proper verdict of LWOP. Receiving no instruction on why the verdict was rejected, and in the wake of the court's ambiguous polling that demonstrated a seeming lack of agreement, the jury felt it had no choice but to advise the court it was deadlocked, and took only fifteen minutes to do so after receiving the new verdict forms (Tr.1072). The deadlocked verdict was coerced by the court's action. Unlike Griffin, where the intent of the legislature was effectuated, the court here bypassed the will of the legislature, which intended to mandate a sentence of LWOP if even one juror

believed that the aggravating factors did not warrant death. *See* 565.030; MAI-CR3d 300.03, 313.41A; Whitfield, 837 S.W.2d at 515.

V. Kenny Was Denied His Right to Procedural and Substantive Due Process

§565.030 created in Kenny the expectation that a jury would assess his punishment in accordance with the four steps set forth in the statute; and that if the jury were able to return a verdict after following the instructions, the judge would be required to accept the verdict. The statute created a liberty interest that is entitled to procedural due process protection under the Fourteenth Amendment. Vitek v. Jones, 445 U.S. 480 (1980). Although one may not have a "constitutional or inherent right" to a particular liberty interest, once a state has afforded the opportunity for that interest, due process protections must be invoked to ensure that the state-created right is not arbitrarily denied or abrogated. Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

The U.S. Supreme Court has held that the denial of a statutory right to jury sentencing also can constitute a violation of substantive due process:

> [w]here . . . a State has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state procedural law. The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury

in the exercise of its statutory discretion, and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State. Hicks v. Oklahoma, 447 U.S. 343, 346 (1980).

In Carter v. Bowersox, 265 F.3d 705 (8th Cir.2001), the trial court failed to instruct the jury on the second step of the four-step process outlined in Section 565.030--that if the jury were unable to unanimously decide that the facts in aggravation warranted death, it had to return a verdict of LWOP. The jurors were not able to agree on punishment, so the judge assessed punishment at death. *Id*.,711.

The Eighth Circuit held that failure to instruct on the second step of the statute was a miscarriage of justice that violated Carter's due process rights under the Fourteenth Amendment. *Id*.,717. It recognized that "Missouri law grants a capital defendant the right not to be sentenced to death unless the jury, in the exercise of its discretion, unanimously finds that evidence of one or more aggravating circumstances warrants the death penalty." *Id*.,716. The federal court held that a reasonable probability existed that if the jury had been properly instructed, it would have sentenced the defendant to LWOP, so the question of punishment would never have reached the trial judge. *Id*. It reversed for new sentencing. *Id*.,717.

Kenny's case is like Carter, because the trial court overlooked the second step of the statute. It failed to take into account that the jury's verdict reflected a lack of unanimity at the second step and thus was a proper verdict of LWOP. By

rejecting the verdict without any valid basis, the trial court violated Kenny's rights to procedural and substantive due process, a fair trial, freedom from cruel and unusual punishment, and to jury sentencing.

Missouri courts have recognized that when a defendant is denied his right to jury sentencing, accorded by statute, he should receive a new trial. The right to jury sentencing is "such a valuable right" that when it has been improperly denied, the defendant must receive a new trial on all issues. State v. McFall, 866 S.W.2d 915, 919 (Mo.App.1993); *see also* State v. Harris, 547 S.W.2d 473, 475-76 (Mo.1977); §565.030.

Finally, although the trial court has discretion to impose a sentence lower than that recommended by the jury, it may not impose one that is greater. Mo.Sup.Ct.R.29.05. By rejecting the jury's proper verdicts of LWOP and imposing two death sentences, the court exceeded its lawful authority.

VI. Kenny Was Denied His Right to be Free From Double Jeopardy

Kenny was denied his right to be free from double jeopardy by the court's refusal to accept the jury's proper verdict. The U.S. Supreme Court has recognized that the capital sentencing phase in Missouri is a trial on the issue of punishment, where the jury must decide whether the State has proven its case. Bullington v. Missouri, 451 U.S. 430, 438, 444 (1981). The jury's rejection of the State's claim that the defendant deserves to die is absolutely final. *Id.*,445. Otherwise, there would exist the "'unacceptably high risk that the [prosecution],

with its superior resources, would wear down a defendant,' thereby leading to an erroneously imposed death sentence." *Id*., *quoting* United States v. DiFrancesco, 449 U.S.117, 130 (1980).

Kenny recognizes that this Court has held that double jeopardy does not attach until the court has accepted the verdict. State v. Peters, 855 S.W.2d 345, 349-50 (Mo.1993). But Kenny's case is distinguishable, because the court had no valid ground for rejecting the jury's verdict. As in Bullington, Kenny underwent a trial, put the State's evidence to the test, and the State was unable to convince all twelve jurors beyond a reasonable doubt that the aggravating facts warranted death. The court's rejection of that verdict and its subsequent imposition of a death sentence places Kenny in double jeopardy.

VII. The Death Sentence Is Inherently Unreliable

The Supreme Court has stalwartly supported the principle that because a death sentence is qualitatively different from any other sentence, there must be a corresponding difference in the need for reliability in the sentencing determination. Woodson v. North Carolina, 428 U.S. 280, 305 (1976). The death sentence imposed by the trial court is inherently unreliable, because the jury properly returned verdicts of LWOP. This Court must give effect to the verdicts of LWOP, because (1) each verdict was valid on its face; (2) each verdict was valid under a legitimate reading of the law and instructions; and (3) neither the court nor the State rebutted the presumption of correctness by ascertaining that

the verdict clearly was not proper. To make matters worse, the court then sent the jurors back to the jury room without one word as to why it was rejecting their verdicts. Through its silence, the court led the jury to believe that it could not return verdicts of LWOP and thus the only possible verdict was that it was deadlocked. Without those coerced verdicts, the court had no authority to assess the punishment. The resulting death sentence--the only verdict that the jury never even attempted to render--is inherently unreliable and cannot stand.

Kenny Thompson respectfully requests that this Court grant him what the jury already has--a sentence of life imprisonment without the possibility of parole on both counts.

ARGUMENT II

The trial court abused its discretion in admitting State's Ex.89 as evidence that the Circuit Court of Pettis County had issued an order of protection to Kenny's ex-wife against Kenny. The exhibit was not relevant--it was entirely inconclusive as to whether Kenny had committed bad acts against Linda and did not shed light on Kenny's character, because the order of protection was effectively nullified when the Circuit Court dismissed the proceeding and assessed costs against Linda. The State committed prosecutorial misconduct by presenting the ex parte order of protection as a final decree, and reading only a selected portion of the exhibit to the jury when other portions showed that the proceeding was dismissed without a hearing and costs were assessed against Linda. The improperly admitted evidence violated Kenny's rights to confront and cross-examine the witnesses against him, to a fair trial, to due process, and to be free from cruel and unusual punishment. U.S.Const., Amends V,VI,VIII,XIV; Mo.Const., Art. I, §§10,18(a),21. Kenny was prejudiced, because the sentencer was improperly led to believe that a court had held a hearing and made a finding that Kenny had committed violence or misconduct sufficient to warrant an order of protection.

The State presented State's Ex.89 as evidence that the Circuit Court of Pettis County had issued an order of protection against Kenny at the request of his

ex-wife Linda (Tr.727). But the exhibit had no relevance, because it was entirely inconclusive on any aspect material to the jury's consideration. Although the exhibit purported to show that the circuit court had issued an order of protection, portions of the exhibit not presented or considered by the sentencer showed that Linda sought to withdraw her petition for order of protection; the court dismissed the cause without a hearing; and costs were assessed against Linda (Ex.89). Yet all the jury heard was that the ex parte order had issued (Tr.727). Kenny was prejudiced by the improper admission of the exhibit since it led the jury to believe that Kenny had been found "guilty" of committing some unspecified misconduct against Linda by a court after a hearing.

Admissibility of evidence is a matter within the sound discretion of the trial court. State v. Kidd, 990 S.W.2d 175, 178 (Mo.App.1999). Error in the admission of evidence should not be declared harmless unless it is harmless without question. State v. Degraffenreid, 447 S.W.2d 57, 64 (Mo.1972).

I. The Exhibit Was Admitted Over Defense Counsel's Objection

The State wanted to submit Ex.89 to show the jury the acts that Kenny allegedly committed to warrant the order of protection (Tr.715-16). The defense objected that the exhibit was full of hearsay, since the State was not calling Linda to testify (Tr.714-15). The court held that because the exhibit was merely certified copies of the action of the circuit court, it was admissible, but it would not be passed to the jury (Tr.716, 719). The defense argued that the fact that an ex parte

order had issued, by itself, was irrelevant, because the relevant information would be what formed the basis for the order; because the State was not presenting Linda's testimony, the jury should not hear anything about it (Tr.717-18, 724). The court held that because the jury had to take the actions of the Circuit Court at face value, it did not need to know the basis for the order (Tr.724). The court held that "the ultimate decision is there [in the ex parte order]" and admitted State's Ex.89 as a certified document of a court proceeding (Tr.725-26).

In open court, the State then moved "for the admission of State's Exhibit 89 which is a certified copy of a file from Pettis County, Cause No. CV491-802DR, entitled Linda Hiller versus Kenneth Thompson, containing an ex parte order against Kenneth Thompson" (Tr.727). The court admitted the exhibit (Tr.727). Defense counsel included the issue in the motion for new trial (L.F.318-19).

II. The Fact that an Ex Parte Order Issued, by Itself, Was Irrelevant

Generally, in capital sentencing phase, both the State and the defense are allowed to introduce any evidence regarding any aspect of the defendant's character. State v. Debler, 856 S.W.2d 641, 656 (Mo.1993). After all, "the decision to impose the death penalty, whether by a jury or a judge, is the most serious decision society makes about an individual, and the decision-maker is entitled to any evidence that assists in that determination." *Id*.

But to be admissible, evidence must be relevant. "Evidence is relevant if the fact it tends to prove or disprove is a fact in issue, or to corroborate evidence which is relevant and which bears on the principal issue. State v. Schlup, 724

S.W.2d 236, 242 (Mo.1987). Evidence tends to prove a fact in issue if, as a matter of logic, it makes the existence of the fact more or less probable than it would be without the evidence. State v. Luna, 800 S.W.2d 16, 20 (Mo.App.1990). Evidence that diverts the jury's attention or causes "prejudice wholly disproportionate" to its logical relevance should be excluded. State v. Mayes, 2001 WL 1609093, at 11 (Mo.2001).

State's Ex.89 made nothing more or less probable, because Ex.89 was inconclusive. The exhibit shows that on December 13, 1991, Linda filed a petition for an order of protection, triggering simultaneous issuance of an ex parte order based solely on Linda's untested allegations (Ex.89). Hearing was set for January 8, 1992 (Ex.89). Sometime before December 23, Linda contacted the court clerk and asked to dismiss the case (Ex.89). On January 8th, the judge issued an entry: "Respondent's whereabouts unknown; Cause dismissed; Costs taxed to Petitioner" (Ex.89).

The Circuit Court held no hearing and made no findings. The preliminary, ex parte order of protection it issued is defined by statute as an order of protection issued by the court before the respondent has received notice of the petition or an opportunity to be heard on it. §455.010(4). A full order of protection, on the other hand, is an order of protection issued after a hearing on the record where the respondent has received notice of the proceedings and has had an opportunity to be heard. § 455.010(6).

The court's dismissal of the proceeding nullified the ex parte order of protection. By statute, the court must hold a hearing within fifteen days after the ex parte order is issued. §455.040. The court may issue a full order of protection only if the allegations are proven by a preponderance of the evidence. *Id*. Without the hearing and findings by the court, the ex parte petition remains mere allegations of wrongdoing; the ex parte order, based solely on hearsay allegations, means nothing. *See* Dawson v. Delaware, 503 U.S.159 (1992)(reversal based on admission of irrelevant, prejudicial evidence).

Missouri courts allow the admission of hearsay only when it bears sufficient indicia of reliability. Ohio v. Roberts, 448 U.S. 56, 66 (1980). By statute, courts may admit certified copies of judicial proceedings. §490.130. The rationale is that the parties in judicial proceedings have received those rights guaranteed by the state and federal constitutions – the right to be heard, to have due process, to have a lawyer and to confront the evidence. When those safeguards are present, the record of the judicial proceeding is sufficiently reliable. But when none of those safeguards were provided, the record of the judicial proceeding does not bear sufficient indicia of reliability and should not be allowed as evidence against the person whose voice was never heard. What reliability does Linda's allegation have, when she herself wanted to "take it back" rather than have a hearing?

"Even if a document falls under the business record exception,… the document will not be admissible if the underlying statement is inadmissible

hearsay." State v. Sutherland, 939 S.W.2d 373,379 (Mo.1997). The underlying statement in the ex parte order--Linda's allegation against Kenny--was inadmissible hearsay, so the ex parte order should not have been admitted at all.

If the State had wanted to have Ex.89 admitted properly, it would have needed to present Linda's testimony, as it did at the first trial (1st Tr.1490-1523). At the sentencing re-trial, the State indicated that Linda was available, yet decided not to call her, apparently for trial strategy reasons (Tr.716). The State had every right to call Linda, but without calling her, it could not present Ex.89 without denying Kenny his right to confront. Sutherland, 939 S.W.2d, 378.

This Court has recognized the lack of reliability of evidence of bad conduct for which the defendant was not tried and convicted:

> Because no jury or judge has previously determined a defendant's guilt for uncharged criminal activity, such evidence is significantly less reliable than evidence related to prior convictions.

State v. Debler, 856 S.W.2d 641, 656 (Mo.1993).

Holding the ex parte order against Kenny, without a hearing or chance to confront the allegation, is wrong. A defendant's sentence cannot be enhanced on the basis of a prior conviction where the defendant had not been represented by counsel. State v. Van Horn, 625 S.W.2d 874, 879 (Mo.1981). So too, the ex parte order, obtained when Kenny was denied his rights to be heard, to counsel, and to confront his accuser, should not be allowed to "enhance" or "aggravate" his current sentence. Yet that is exactly what the ex parte order did.

III. Prosecutorial Misconduct

The State committed prosecutorial misconduct by improperly leading the judge and the jury to believe that the ex parte order of protection was the "ultimate decision" of the Circuit Court of Pettis County (Tr.725). The State knew that the exhibit would not be passed to the jury (Tr.719). The State read to the jury a small portion from the exhibit--that the ex parte order had been granted--but neglected to inform the jury that it was dismissed without a hearing (Tr.727). Yet the State's own exhibit states in two places that the case was dismissed and that no hearing was held (Ex.89). The exhibit was handed to counsel just before the State moved to admit it--in fact, the exhibit itself was not even certified until January 23, 2001, the second day of trial (Tr.714-15; Ex.89). *See* Gardner v. Florida, 430 U.S.349, 362 (1977)(death sentence vacated due to trial court's assessment of punishment based on information that defendant did not have the chance to deny or explain). Although defense counsel stated that he was not surprised by the ex parte order, there is no indication that he was at all aware of the remainder of the exhibit, such as the dismissal (Tr.722-23). *See* Lankford v. Idaho, 500 U.S.110, 126-27 (1991)(new sentencing granted because counsel was not given adequate notice that court was considering imposing the death penalty).

The State has a sacred obligation "not merely to win a case, but to see that justice is done, that guilt shall not escape nor innocence suffer." State v. Burnfin, 771 S.W.2d 908, 914 (Mo. App. 1989). As the State's representative, the prosecutor must remain impartial, as his role is not to seek a conviction at any cost

but to seek justice. State v. Storey, 901 S.W.2d 886, 901 (Mo.1995). The State has a duty of candor to the court. Rule 4-3.3.

The State sought to take Kenny's life through these proceedings. It sought to show that Kenny had a bad character, was a bad husband, and a bad man. To do so, the State presented evidence that misled the jury and judge to believe that another court had heard evidence and found that Kenny had in fact committed conduct to support the State's view of him as a bad husband and a bad man. Yet the State either knew, or very well should have known, that the Circuit Court dismissed that action without a hearing and without issuing a full order of protection. A conviction cannot stand when "the State, although not soliciting false evidence, allows it to go uncorrected when it appears." Napue v. Illinois, 360 U.S.264, 269 (1959). By presenting only half the story and allowing the judge and jury to be misled, the State violated its sworn duty to see that justice is done.

IV. The Sentencer Believed the Ex Parte Order Was Relevant Evidence

The court concluded that the ex parte order was admissible since it was the "ultimate decision" of the Circuit Court (Tr.725). But it was not the ultimate decision--it was merely a preliminary ruling. In fact, the ultimate decision of the Circuit Court was to dismiss the proceeding and assess costs against Linda!

If the court itself presumed that the ex parte order was the circuit court's final decision, the jury must have made that presumption too. The jury, like the court, must have presumed that the ex parte order was the result of a hearing and a

court's finding that Kenny was guilty of committing wrongdoing so as to warrant the order of protection.

The sentencer must have given the ex parte order the same weight as a criminal conviction. The judge's comments indicate he considered it admissible, relevant evidence. Missouri law recognizes that juries will consider prior criminal activity in assessing the death penalty. §§565.032.1(3), 565.032.2(1), 565.032.3(1). The ex parte order in essence rose to the level of a conviction for some sort of domestic abuse, assault, or stalking. "To the average juror, . . . unconvicted criminal activity is practically indistinguishable from criminal activity resulting in convictions." Debler, 856 S.W.2d at 656.

Kenny had no convictions for violent crime--his priors were for passing bad checks (Tr.788-95). But to the sentencer, the ex parte order was a "conviction" for exactly that criminal behavior that Kenny was convicted of in the instant case. By presenting the ex parte order, the State attempted to show that he had a "character for" or propensity towards irrational acts and violence against women. After all, the instant case centered around Kenny's alleged obsession with his current wife, Tracey, and how that obsession drove him to violence. The State used the ex parte order to strike at the heart of the defense and show that the crimes against Tracey and the Mennings were not an isolated incident but a long-held pattern of behavior and part of his character.

In People v. Bedoya, 758 N.E.2d 366, 369 (Ill.App.Dist. 2001), the State presented evidence that the defendant had fired shots from his car earlier in the

evening, to support its claim that he committed first degree murder later when he shot the victim at close range. The court failed to advise the jury that the defendant had been acquitted of firing the gun from his car, so the jury was left with the impression that those charges were still pending. *Id*.,381. Because the jury may have been misled, the appellate court reversed. *Id*.

The facts in Kenny's case make it an even better candidate for reversal. While in Bedoya, the jury was left with the belief that the charges had not been resolved, Kenny's sentencer would believe that Kenny had in fact been "found guilty" of committing some violence or misconduct against Linda. The case was dismissed--in effect Kenny was acquitted--yet the allegation was used to sentence Kenny to death.

The jurors were charged with the responsibility of assessing whether the aggravating factors warranted the death penalty, whether the mitigating factors outweighed the aggravating; and whether the death penalty should be imposed. If even one juror determined that the facts in aggravation did not warrant the death penalty, the jury was required to return a verdict of LWOP. §565.030.4. The ex parte order constituted a very bad--yet unsubstantiated--aggravating fact which the jury must have considered. Because the court itself believed the ex parte order was the "final decision" of the Circuit Court and gave it weight accordingly (Tr.725), this evidence must have influenced the court's decision to sentence Kenny to death.

Kenny must receive a new penalty phase, where his fate would not be

determined based on a totally unsubstantiated allegation. "The penalty of death is qualitatively different from a sentence of imprisonment, however long…. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280, 305 (1976). There is no such reliability here. The improperly admitted evidence violated Kenny's rights to confront and cross-examine the witnesses against him, to a fair trial, to due process of law, and to be free from cruel and unusual punishment. Kenny must receive a new sentencing.

ARGUMENT III

The trial court abused its discretion in letting the State present testimony through Prine and VanStraten that Arlene Menning moved either during or after the assault, because (1) any marginal relevance of the testimony was outweighed by its prejudicial effect; and (2) the testimony of the witnesses was cumulative, thereby violating Kenny's rights to a fair trial, to due process, and to be free from cruel and unusual punishment. U.S. Const., Amends.V,VI,VIII,XIV; Mo. Const., Art. I, Secs.10,18(a), 21. Kenny was prejudiced, because the jury was bombarded with gruesome photographs and repeated discussion of how the victims' blood flew, flowed, dripped and spattered, thereby distracting the jury and improperly inflaming their passions.

The trial court erred in letting the State present irrelevant testimony that Arlene Menning's arms and head moved during the assault (Tr.606-07,609-10,616-17,639-40). The testimony was irrelevant because the witnesses admitted that they had no way of knowing whether Arlene moved her arms voluntarily, or whether her arms moved simply as a function of being struck (Tr.625-26,639, 644-45). Yet the court let the State repeat identical testimony through Michael VanStraten, so that the sentencer was repeatedly exposed to the same irrelevant testimony and the same gory photographs again and again (Tr.632-42). This violated Kenny's rights to a fair trial, to due process of law, and to be free from

cruel and unusual punishment. U.S.Const., Amends. V,VI,VIII,XIV; Mo.Const., Art. I, Secs. 10,18(a),21.

Defense counsel objected that this testimony was irrelevant and that the testimony of both witnesses was cumulative (Tr.215-21,563-67,591,596,630-32; L.F.312-14).

Both Prine and VanStraten testified regarding the basics of blood-stain analysis (Tr.597,601-04, 614,635-36). Both concluded that the victims had to have been struck at least twice (Tr.619,642). Both testified that Arlene's head and right arm moved either during or after the attack, but they could not state whether the movements were voluntary or involuntary (Tr.606-07,609-10,625-26,616-17,639-40,644-45). [5]

I. The Ruling Warrants No Deference

Evidence is relevant if it "tends to prove or disprove a fact in issue or corroborates other relevant evidence." State v. Rousan, 961 S.W.2d 831,848 (Mo.1988). Expert testimony should be excluded if it does not assist the jury or if it unnecessarily diverts the jury's attention. State v. Brown, 998 S.W.2d 531,549 (Mo.1999).

[5] Prine testified that the left arm moved as well, but VanStraten was only asked about the right arm (Tr.607-09,615-15,643).

The testimony that Arlene's right arm and head moved during the assault was irrelevant without any proof that she was awake at the time. The two witnesses testified that they had no way of knowing whether the movements were voluntary or involuntary, or whether Arlene was awake or asleep when she allegedly moved (Tr.625-26,639,644-45). The testimony raised a specter of an issue that it couldn't prove. As such it unnecessarily diverted the jury's attention and should have been excluded.

Admitting or excluding evidence is within the sound discretion of the trial court. State v. Driscoll, 55 S.W.3d 350, 354 (Mo.2001). Appellate courts defer to a trial court's ruling unless the court abused its discretion. State v. Uka, 25 S.W.3d 624, 627 (Mo.App.2000). A trial court's ruling should not be accorded deference if the trial court based its ruling on incorrect factors. State v. Cole, 867 S.W.2d 685, 686 (Mo.App.1993) (reversing conviction because "the court declined to exercise its discretion by first previewing the tape for admissibility").

The court's ruling here does not warrant deference. The court believed it had no duty to weigh the testimony's probative value against its prejudicial effect (Tr.219,222). That's flat wrong. Evidence is legally relevant only if its probative value outweighs its prejudicial effect. Driscoll, 55 S.W.3d, 354. Even logically relevant evidence cannot be admitted if it causes "prejudice wholly disproportionate to [its] value and usefulness." State v. Rousan, 961 S.W.2d 831,848 (Mo.1988). The trial court ignored the testimony's prejudicial effect and thus its ruling warrants no deference.

II. The Evidence Had Only Marginal Relevance Yet Was Highly Prejudicial

The prejudicial effect of the testimony vastly outweighed any possible probative value. Both Prine and VanStraten admitted that they couldn't determine whether Arlene was awake or asleep when she was struck. Thus, any probative value of the testimony was extremely limited. In contrast, the prejudicial value was great - the State used the testimony to parade bloody photo after bloody photo before the jury and judge.

Prine displayed eight bedroom/crime scene photographs and two autopsy photographs (Tr.600-19). He described what each picture depicted and then asserted its alleged significance (Tr.600-619). He left up the photos throughout his testimony (Tr.604). This was the second time the jurors endured these gruesome photographs (Tr.491-502).

The State displayed these photographs under the pretext of explaining technical terms used in blood-stain analysis. Much of it was unnecessary or blatantly obvious to even lay jurors. Prine displayed Ex.33, depicting how the victims were lying in bed (Tr.600). He displayed Ex.92, the bloody maul handle, to explain in detail that blood forms a stain when it impacts an object (Tr.600,602-04). He showed the jury Ex.54, a close-up of the blood drops on the ceiling, to show how blood drops form an elliptical shape (Tr.603-04). He displayed Ex.36, again depicting the victims in bed, to emphasize the impact stains on headboard, pillows, and "flow patterns" of blood on Clarence's chin (Tr.605-06). He displayed Ex.93, again depicting the victims in bed, to show blood-impact stains

and blood-flow patterns (Tr.610). He displayed Ex.43, the bloody headboard, to explain how blood forms a "void" in the places it doesn't reach and to show that the blood came from the Mennings' bed (Tr.613-14). He displayed Ex.96, Arlene lying in bed, to show blood-impact stains (Tr.615-16). Finally, he displayed Ex.61, a close-up of the victims again in bed, to show impact stains, flow patterns, and a blood-pool on Arlene's shoulder (Tr.616-17).

Worse, the State even had Prine describe Exs.79 and 97, autopsy photographs. This let Prine vouch that the injuries shown in the photographs were consistent with the blood stains (Tr.618). Prine, however, admitted that the questions were beyond his expertise (Tr.618)

Next, through VanStraten, the jury and judge viewed and heard about one new photograph and four they had already seen (now for the third time) (Tr.638-43). The State had VanStraten explain that Ex.36 (both victims in bed), showed a "convergence" of the blood stains by the pillows or headboard, but he never showed the relevance of this "convergence" (Tr.637-38). Ex.94 depicted a blood-spattered dresser, to explain that the drops were blood "impact stains" (Tr.638). Ex.61 again showed the victims in bed, to explain the blood stains and blood flow patterns (Tr.638-39). Ex.96 depicted Arlene in bed and showed blood stains under her elbow (Tr.639). Finally, Ex.93 again showed both victims in bed, to show the impact stains, blood-flow out of Clarence's mouth, and the lack of blood under his pillow (Tr.640-41).

The State went into excruciating and repeated detail about the blood evidence, yet no true "conclusions" could be garnered from such detail. The State dwelled on obvious and unchallenged facts, *eg*., that the blood spattered around the room came from the Mennings; that the assault caused the injuries; and that the maul handle was used in the attack. The only "evidence" to be gained from the testimony was that Arlene's right arm, possibly her left arm, and head moved either during or after the assault. Yet, without knowing the means by which Arlene moved, whether it was her own will or because she was struck, the fact that she moved was irrelevant.

III. Testimony of the Two Witnesses was Cumulative

The court rationalized that since it was standard procedure in blood-stain analysis to receive a second opinion, and VanStraten served as Prine's "second opinion," VanStraten should get to testify (Tr.564-65). But the State truly just had one witness in this regard. In fact, when the State sought admission of the gory photographs, it referred explicitly to one sole blood-stain expert--stating that the photographs had been relied on "by my blood spatter expert, blood stain expert. And I apologize, but he doesn't like the term splatter" (Tr.461,463)(emphasis added).

The court stated that "the cumulative objection is probably well taken" but let VanStraten testify anyway (Tr.222). Prine admitted that he and VanStraten reached the same conclusions (Tr.558). The State itself agreed that, although the

experts reached the same conclusions, they simply "explain things in a different manner" and that VanStraten "would not word things the way [Prine] does" (Tr.221-22)(emphasis added).

Evidence is cumulative when it relates to a matter so fully and properly proved by other testimony that it is beyond serious dispute." State v. Kidd, 990 S.W.2d 175,180 (Mo.App.1999). It is "additional evidence of the same kind tending to prove the same point as other evidence already admitted." State v. Green, 603 S.W.2d 50,51 (Mo.App.1980). The trial court has discretion to reject cumulative evidence. State v. Reichert, 854 S.W.2d 584,599-600 (Mo.App.1993). Since it bears the burden of proof, the State should not be "unduly limited" in the evidence it adduces, even if cumulative. Kidd, 990 S.W.2d at 180. Evidence is not to be rejected as cumulative when it goes to the very root of the matter in controversy or relates to the main issue. State v. Perry, 879 S.W.2d 609,613 (Mo.App.1994). But, when cumulative evidence is only marginally relevant, it should be excluded. *See e.g*., Kluck v. State, 30 S.W.3d 872, 879 (Mo.App.2000) (evidence that dead victim's blood contained valium and .18 alcohol content could reasonably be considered cumulative and of marginal relevance, even though defense contended that she committed suicide).

Although the State had already admitted that Prine and VanStraten reached the same conclusions, it later alleged that Van Straten would provide testimony that was not covered by Prine (Tr.221-22,631-32). But his testimony was merely a sub-set of Prine's:

Prine	**Van Straten**
Mennings' blood was on maul handle (Tr.604-05)	Not asked
Arlene's right arm moved (Tr.607-09,615-16)	Arlene's right arm moved (Tr.639-40)
Arlene's left arm moved (Tr.610-11)	Not asked
Arlene's head moved backwards (Tr.616-18)	Arlene's head moved backwards (Tr.638-39,645)
The blood stains originated from the Mennings in bed (based on blood on headboard and lack of blood behind headboard) (Tr.613-14)	Arlene's blood converged on the ceiling and headboard (Tr.637-38)
Arlene's left arm was close to Clarence when he was struck (Tr.611-13)	Not asked
The injuries depicted in the autopsy photographs are consistent with the impact stains at the scene (Tr.618)	Not asked
Clarence did not change position (Tr.612)	Clarence did not move (Tr.641,645)
Not asked, but obvious from photo (Ex.94)	The dresser had drops of blood (Tr.638)

There was more than one blow (Tr.618-19)	There was more than one blow (Tr.642-43)

VanStraten's testimony covered exactly the same ground as Prine's testimony in all material respects. It truly was "additional evidence of the same kind tending to prove the same point as" Prine's testimony. Green, 603 S.W.2d at 51.

This Court should not allow the State to repeatedly bring the same evidence merely because it has the burden of proof. After all, this Court has recognized that "the party who can present the same testimony in multiple forms may obtain an undue advantage." State v. Seever, 733 S.W.2d 438,441 (Mo.1987); State v. Cole, 867 S.W.2d 685,686 (Mo.App.1993).

The State obtained an unfair advantage over Kenny by parading the bloody, gruesome photographs in front of the jury for a second and third time to discuss an issue that was barely marginally relevant. Interestingly, the State didn't present any blood-stain evidence during the first trial (1st Tr.). The testimony could not have been so crucial to its case if it completely omitted it during the first trial. The State's excesses denied Kenny of due process and a fair trial and subjected him to cruel and unusual punishment. This Court should vacate his death sentence and remand for a new trial.

ARGUMENT IV

The trial court abused its discretion in admitting State's Exs.37,43,80, 84,85,86,88,95,97, because admitting the cumulative, irrelevant and highly prejudicial photographs violated Kenny's rights to due process, a fair trial before a fair/impartial jury and freedom from cruel and unusual punishment, U.S.Const., Amends. V,VI,VIII,XIV; Mo.Const., Art.I, Secs.10,18(a),21, in that:

(6) 95 was cumulative to 35 – both depicted the Mennings from the same view – the only difference was that 95 was slightly closer-up;

(7) 37 was cumulative to 93 – both depicted the Mennings from the same view, with a focus on Clarence – the only difference was that 37 was slightly closer-up;

(8) 43, depicting Clarence's bloody head, bloody wall and headboard, was cumulative to Exs.37,38,39,40,41,47,93;

(9) 80 (Clarence) and 88 (Arlene) - autopsy photographs showing scalp peeled back- were cumulative to three other exhibits; and

(10) 84, 85, 86, 97 – four autopsy photographs showing the same wounds to Arlene's head - were irrelevant, cumulative, and prejudicial.

Kenny was prejudiced because the photographs invited a sentence based on passion and prejudice, making Kenny's death sentence inherently unreliable.

The State doused the courtroom--judge and jury--with the Mennings' blood by showing bloody photographs of the victims over and over through a crime scene videotape and the testimony of five witnesses.[6] The State displayed over forty bloody photographs--full color 8x10 (or larger) glossies, many close-up and several shown two or even three times--although its experts used only twenty in their testimony. Guilt was not at issue. State v. Thompson, 985 S.W.2d 779 (Mo.1999). Indeed, Kenny admitted from the start that he had beaten the Mennings with a maul handle (Tr.662). Although the State was entitled to present the circumstances of the crime, it went overboard, repeatedly displaying irrelevant, cumulative, and highly prejudicial photographs. Obviously, the State sought to inflame the passions of the jury and judge so that all they could see in determining Kenny's sentence was blood.

The trial court has broad discretion to admit photos and its ruling will be affirmed absent an abuse of discretion. State v. McMillin, 783 S.W.2d 82, 101 (Mo.1990). Photographs, although gruesome, may be admissible where they show the nature and location of wounds, assist in better understanding the testimony and aid in establishing an element. State v. Murray, 744 S.W.2d 762, 772 (Mo.1988). Photographs should not be admitted, however, when their prejudice overrides their probative value. *Id*.

[6] Several photos were shown to even a sixth witness, but it is not clear from the record whether he displayed the photos to the jury (Tr.570).

Cumulative evidence is "additional evidence of the same kind tending to prove the same point as other evidence already admitted." State v. Green, 603 S.W.2d 50, 51 (Mo.App.1980). The trial court has discretion to reject such evidence. State v. Reichert, 854 S.W.2d 584, 599-600 (Mo.App.1993).

I. Crime Scene Photographs

Defense counsel objected that Exs.35 and 95, and Exs.37 and 93, were cumulative, but the court overruled the objections and admitted the exhibits (Tr.460-62,496;L.F.322). Although defense counsel objected to the admission of Ex.43, he did not give a specific ground for the objection (Tr.496), so Kenny requests review for plain error as to that argument. Rule 30.20.

Exs.95 and 35 each depicted the victims lying in bed--Ex.95 simply zoomed in closer and omitted the headboard and the top of Arlene's head (Ex.95). The State justified admitting Ex.95, arguing that it was relied on by its blood-stain expert (Tr.461). The State vouched that the photograph shows a "significant finding" that Arlene's right arm had changed positions (Tr.461).

But neither of the blood-stain witnesses made any mention of Ex.95. Ex.95 merely duplicated Ex.35. Ex.95 served "no useful purpose in proving the crime" and thus should have been excluded. State v. Morris, 248 S.W.2d 847, 849 (Mo.1952).

So, too, Exs.93 and 37 were cumulative. They depicted the victims from Clarence's side of the bed, with Ex.37 slightly closer than Ex.93. The State justified these exhibits by stating that in Ex.37, "you can see [Clarence], the close

up of the blood spatter on his arm, his left arm, the top of the sheets, the comforter, and also on the...upper left thigh of Mrs. Menning" (Tr.463). The State claimed that Ex.93 was relied on by the blood-stain expert, showed Clarence from a different angle, showed the headboard and entire pillow, and related to a finding of a void by the blood spatter expert (Tr.463).

But Ex.37 provided nothing that was not already provided by Ex.93. The blood-stain "experts" did discuss Ex.93 (Tr.609-11,640-41), but they never mentioned Ex.37. There was no relevance to seeing Arlene's thigh or the entire pillow, and the headboard was not visible in any detail in either picture. There was no void depicted in either of the photographs--to see a void, one would have to see behind the object hit by spatter (Tr.614). Ex.37 was superfluous gore and should have been excluded.

Ex.43 depicted Clarence's head and blood-spatter on the wall and the headboard. The court admitted it, as well as Exs. 38, 39, 40, 41, and 47, each depicting the blood-stains on the headboard and wall (Tr.496).

Crime scene technician Kaiser described Exs.38, 39, 40, 41, 43, and 47 (Tr.498). Exs.38 and 39 showed the wall, with blood droplets going up to the ceiling; Ex.40 showed blood-stains on the headboard; Ex.41 showed "the north wall just barely above the center section of the headboard showing a concentration of blood on the north wall"; Ex.47 depicted "a close up of blood droplets, blood stains on the north wall just east of the bedpost, above the bedpost"; and Ex.43 "shows a better view of the injuries to Clarence Menning's head" (Tr.498).

Prine concluded from Ex.43 that the blood came from the Mennings in bed (Tr.613-14). But, why is this needed? This fact is obvious. This photograph was entirely cumulative to the other photographs and served merely as an excuse to show the jury yet another gory photograph of Clarence's bloody head and the bloody wall, after the jury already had viewed numerous photographs of both Clarence's head and/or the bloody wall (Exs.35,36,37,38,39,40,41,47, 55,58,59,61,80,88,93,95).

II. Autopsy Photographs

The court overruled defense counsel's objections that Exs.84, 85, 86 and 97 were cumulative (Tr.479-80;L.F.322). Kenny requests review for plain error on his claim that Exs.80,87 and 88 are irrelevant and cumulative. Rule 30.20.

Exs.84, 85, 86, and 97 were autopsy photographs of the left side of Arlene's head. Ex.97 showed the injuries without any obstruction, while Exs.84, 85, and 86 showed the injuries somewhat obstructed by a ruler. Ex.97 portrayed the nature and location of the wounds, but the others were superfluous.

In its interlocutory ruling, the court stated that Exs.84, 85, and 86 would probably be admitted but expressed reluctance about Ex.97 (Tr.480-81). The court noted, "I don't think it's prejudicial but I don't know, somewhere there's a line as to how many photos. . . . I think that is a little cumulative" (Tr.480-81). Yet the court admitted all four photos over objection (Tr.536).

Admission of all four photographs was erroneous. The only one that was necessary was Ex.97. In fact, Ex.97 was the only one referred to by Dr. Dix, who performed the autopsy (Tr.780). As this Court has warned, "We see no reason why the trial court should permit the introduction of four pictures of the same scene with no difference between them except the angle from which they were taken." State v. Lapsy, 298 S.W.2d 357, 361 (Mo.1957).

Exs.80, 82, and 83 depicted Clarence during the autopsy, with his scalp peeled back. After describing Exs.82 and 83, the State asked Dr. Dix what Ex.80 showed (Tr.777). Dr. Dix reiterated, "It shows similar to what you've already seen showing you that there are some fractures to the top of the skull and the open defect with some brain material visible" (Tr.777)(emphasis added). Dr. Dix did not discuss Ex.80 after that. Ex.80 provided nothing that was not already provided by Exs.82 and 83 and therefore should have been excluded.

Exs.87 and 88 depicted Arlene with her scalp peeled back and resting on her face. Dr. Dix referred to Ex.87 to explain Arlene's wounds (Tr.780-81), but he never mentioned Ex.88. It was cumulative, irrelevant, and should have been excluded.

III. Kenny Suffered Prejudice by the Jury's Repeated Exposure to Irrelevant, Excessive and Cumulative Photographs of the Bloody Scene

Guilt had already been established. *See* Thompson, *supra*. Indeed, Kenny admitted to beating the Mennings with a maul handle (Tr.662). Although the State

was entitled to show the nature of the crimes, it went overboard by displaying over forty bloody crime scene and autopsy photographs.

The barrage of gory photographs started with the testimony of crime scene technician Kaiser, who displayed all thirty-one of the bloody bedroom photographs and explained what each depicted (Tr.491-502). Another witness presented thirteen autopsy photographs and explained what each depicted (Tr.535-38). Next, blood-stain expert Prine redisplayed ten of the same bloody crime scene and autopsy photographs (Tr.579-618). Blood-stain expert VanStraten redisplayed five more photographs that the jury had already seen--four of the photographs had been seen twice already (Tr.637-41). Finally, the State's last witness, Dr. Dix displayed nine more of the previously seen autopsy photographs (Tr.775-82). This would be the third time that two of these photographs were shown (Tr.774-82). In addition to these photographs, the State played a crime-scene videotape and showed the jury the bloody maul handle and portions of the bloody light fixture and ceiling (Tr.490-505,540).

All in all, the State showed the jury 44 bloody crime scene or autopsy photographs. The "expert" witnesses--Prine, VanStraten, and Dix, referred to only 20 of the 44 that were displayed. Obviously, the State had no need to present over half of the photos it displayed. At least eight of the photographs were blatantly cumulative or irrelevant and should have been excluded.

This Court has held that gory "photographs should not be admitted where their sole purpose is to arouse the emotions of the jury and to prejudice the

defendant." State v. Floyd, 360 S.W.2d 630, 633 (Mo.1962). "The sound governing principle is that photographs which are calculated to arouse the sympathies or prejudices of the jury are properly excluded if they are entirely irrelevant or not substantially necessary to show material facts or conditions." *Id.*, *quoting* 73 A.L.R.2d 725, 802 (1976).

Kenny acknowledges that bloody crimes engender bloody photographs, but still there must be some limit. In Thompson v. Oklahoma, 487 U.S. 815, 820 (1988), the state appellate court held that the trial court erred in admitting three photographs that "served no purpose other than to inflame the jury" but held that the error was harmless given the defendant's overwhelming guilt. The U.S. Supreme Court granted certiorari on the issue of whether "photographic evidence that a state court deems erroneously admitted but harmless at the guilt phase nevertheless violates a capital defendant's constitutional rights by virtue of its being considered at the penalty phase." *Id.*,820-21. Unfortunately, the Supreme Court decided the case without reaching this issue. The Court's interest in the issue serves as a strong warning to state courts, not to allow the parading of gory, yet irrelevant, photographs during capital sentencing trials.

Evidence that Kenny deserved the death penalty was not overwhelming. In fact, the jury tried to assess Kenny's sentence at life imprisonment, only to have the court inexplicably reject that verdict and sentence Kenny to death (Tr.1066,1072-73). *See* Point I, *supra*. If the jurors had not been barraged with the irrelevant and cumulative photographs, they all would have agreed with Juror

Meyer that the facts in aggravation did not warrant death. After all, the State urged the jury to look at the "bloody and brutal" photographs during their deliberations, and the jury requested and received all 31 of the bloody bedroom crime scene photographs (L.F.262; Tr.1013,1060). But for the barrage of inadmissible photographs, sentencing never would have reached the court. *See*, *e.g*., Carter v. Bowersox, 265 F.3d 705 (8th Cir.2001). The resulting death sentence is inherently unreliable and cannot stand.

ARGUMENT V

The trial court abused its discretion in sustaining the State's objection and barring defense counsel from eliciting evidence to defend against the State's death prosecution--that Tracey and Kenny moved to South Dakota so Tracey could avoid being picked up on bad check charges--to rebut and defend against the State's evidence that Kenny was cruel and controlling by showing how much he was willing to sacrifice for her and the extent to which he would go to protect their relationship. The court's refusal to allow the defense to present the mitigating evidence denied Kenny his right to a fair trial, to due process, and freedom from cruel and unusual punishment. U.S.Const., Amends. V,VI,VIII,XIV; Mo.Const., Art. I, §§10,18(a),21. The testimony was very key, relevant mitigating evidence that the defense was entitled to present and the sentencer was entitled and indeed required to consider in the capital sentencing trial.

In Lockett v. Ohio, 438 U.S. 586, 604 (1978), the U.S. Supreme Court held that "the sentencer, in all but the rarest kind of capital case, [should] not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." The sentencer should have "possession of the fullest information possible concerning the defendant's life and characteristics" since it is "[h]ighly relevant--*if not essential* --[to the] selection of

an appropriate sentence." *Id*.,603, *quoting* Williams v. New York, 337 U.S. 241, 247 (1949) (emphasis added).

This Court too has acknowledged that, "in a capital case, the sentencer may not be precluded from considering, as a mitigating factor, any relevant circumstance that the defendant proffers as a basis for a sentence less than death." State v. Deck, 994 S.W.2d 527, 540 (Mo.1999). After all, "the decision to impose the death penalty, whether by a jury or a judge, is the most serious decision society makes about an individual, and the decision-maker is entitled to any evidence that assists in that determination." State v. Debler, 856 S.W.2d 641, 656 (Mo.1993).

Typically, the court has discretion in determining whether evidence is relevant. State v. Brown, 718 S.W.2d 493 (Mo.1986). But in capital sentencing, "the defendant is allowed to introduce *any* evidence that may mitigate the penalty imposed." State v. Whitfield, 837 S.W.2d 503, 512 (Mo.1992), *citing* Penry v. Lynaugh, 492 U.S. 302, 317-19 (1989). **Any defense evidence that explains an aggravating factor "is mitigating evidence even if it may not technically be a mitigating circumstance itself."** *Id*., 512.

The State presented Kenny as someone who obsessively dominated his wife (Tr.247,326). Yet the defense was not allowed to elicit testimony to defend against this aggravating evidence by showing the flip side of the coin – that Tracey had control over the relationship and that Kenny was willing to make great sacrifices for her (Tr.319-21).

Tracey testified that she wanted out of the marriage to Kenny because she was "tired of being controlled" (Tr.247). According to Tracey, Kenny "had to know where I was at 24 hours a day. He told me when I could wear makeup, when I couldn't, what to wear, when to wear it. He was verbally abusive, mentally abusive" (Tr.247).

On cross-examination, defense counsel wished to ask Tracey why she moved to South Dakota (Tr.318). In a bench conference, defense counsel advised the court that Tracey would testify that she left Missouri because she had warrants for her arrest on bad check charges (Tr.318-19). Kenny helped Tracey by agreeing to move to South Dakota for her (Tr.319).

The court held that the testimony was irrelevant unless the defense was trying to impeach Tracey (Tr.319). Defense counsel advised the court that he was not trying to impeach her, but rather, show the nature of the relationship between Tracey and Kenny, as mitigating evidence for the crime (Tr.319-21). Defense counsel explained that Kenny killed the Mennings to keep them from interfering with his relationship with Tracey (Tr.320). The crimes centered on the relationship, so the jury must know the circumstances regarding the relationship to could understand the crimes themselves (Tr.319-20). Since the State had showed that Kenny controlled Tracey, the defense should be allowed to show just how much Kenny was willing to do for Tracey, how important the relationship was to him, and how strong his feeling were for her (Tr. 319-21). The court held that the testimony was irrelevant (Tr.321).

On redirect, the State asked Tracey how Kenny had changed after they moved back to Missouri from South Dakota (Tr.326). Tracey testified that once they returned to Missouri, Kenny threatened her and was getting more abusive, physically, verbally and sexually (Tr.326).

Defense counsel argued that Tracey's testimony about how Kenny had changed opened the door to how he was when they moved to South Dakota, and precisely, why they moved there (Tr.328-29). The court again sustained the State's objection (Tr.329).

As a result, the State was able to present a picture of Kenny as controlling and obsessive--someone who committed the crimes out of rage and jealousy. But Kenny was not allowed to defend against this evidence and the jury was not allowed to consider the full picture--that Kenny was extremely protective of his relationship with Tracey and had gone to great lengths to protect it in the past, including uprooting himself from his home and family to move with Tracey to a distant state simply so Tracey could avoid some arrest warrants.

The sentencer's sole task was to determine if the State had proven at least one aggravating factor; if that factor warranted the death penalty; if the aggravating factor/s outweighed the mitigating factors; and if death was warranted. But the court's exclusion of mitigating evidence—explaining, rebutting, and defending against the State's evidence that Kenny only thought of himself in his relationship with Tracey—prevented the jury and the judge from performing the sentencing function as required by law. Since the crimes were so

intimately tied to the relationship, the sentencer should have considered this mitigating evidence. Kenny was denied due process by the imposition of a death sentence based on information that he had no opportunity to deny or explain. Gardner v. Florida, 430 U.S. 349, 362 (1977).

How ironic that while the State was allowed to go on at length and drench the courtroom with bloody photographs and testimony regarding blood spatter--evidence which had marginal relevance, if any--the defense was not allowed to present this relevant mitigating evidence that went straight to the heart of the defense. The death sentence, obtained as a result of the restriction on mitigating evidence, is inherently unreliable and cannot stand.

ARGUMENT VI

The trial court abused its discretion in allowing the State to elicit from Sheriff Spencer, over defense counsel's objection, that Kenny jimmied the locks to get out of the cell, because the testimony violated Kenny's rights to due process, a fair trial, and freedom from compelled self-incrimination and cruel and unusual punishment. U.S.Const., Amends. V,VI,XIV; Mo.Const., Art. I, §§10,18(a),19,21. Kenny was prejudiced, since the only basis for Spencer's knowledge was a statement that Kenny made without being Mirandized; the State had previously agreed not to use the statement; defense counsel did not open the door to the testimony simply by asking if Kenny had committed any violence during the escape; and the State used the testimony to further emphasize that Kenny was a great escape-risk who must get the death penalty so he would not escape again.

During the first trial, then prosecutor, Linda Koch, conceded, "no Miranda warnings were given to Mr. Thompson [after his return to custody following the escape] so we will not elicit anything that Mr. Thompson told Sheriff Spencer about the escape" (1st Tr.819). The court sustained defense counsel's motion to suppress the statement (1st Tr.820).

But despite its promise and the court's order[7], the State was anxious to elicit the statement (Tr.577-78). The State asked Deputy Fajen what he overheard in a conversation between Kenny and Spencer (Tr.577). Defense counsel objected, reminding the court that the motion to suppress had been sustained (Tr.578). The State replied that it was laying the foundation for the court to reconsider its ruling (Tr.578). The State adamantly argued that the jury should know Kenny's role in the escape, since it went to his character and state of mind and there was no surprise to the defense (Tr.578). The court instructed the parties to find the basis for the court's prior ruling and return to the issue later (Tr.580-81).

The issue did not arise again until Spencer testified (Tr.750-51). The State elicited that about two months before he escaped, Kenny told Spencer that he had no plans of escaping (Tr.752). Spencer testified that Kenny escaped during the time when the fence around the jail was down and was being replaced (Tr.753).

On cross, Spencer testified that Kenny escaped with five others (Tr.756). The surveillance cameras inside the jail had poor night visibility, and there were no night jail guards (Tr.754). Spencer testified that to the best of his knowledge,

[7] At the start of trial, the court stated that it would maintain the same rulings it had made on the motions filed prior to the first trial (Tr.1-3). The State agreed, stating "I see no reason why the Court's previous rulings should not stand" (Tr.3).

Kenny did not commit any violence to escape or while out during the escape (Tr.755).

The State then asked Spencer if he knew what specific acts Kenny had done to enable him to escape (Tr.755-56). Spencer responded that Kenny was one of the six who got into the sally port area, got access to the brick wall, and took several days to chip through the brick wall (Tr.756). The State repeated its question of what specific acts Kenny had done (Tr.756). Defense counsel objected that the only knowledge Spencer had was through the unlawful interrogation (Tr.756). The State argued that defense counsel opened the door when he asked whether Kenny had committed any violence in escaping (Tr.756-57). The court overruled the objection (Tr.758). The State then re-asked the question (Tr.758). Spencer responded that, "[Kenny] was the one that jimmied the locks to get out of the cell and into the sally port area" (Tr.758).

The Fifth Amendment mandates that "No person . . . shall be compelled in any criminal case to be a witness against himself." "The prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." Miranda v. Arizona, 384, 436, 444 (1966). The State itself conceded that Kenny's statement to Spencer lacked such safeguards and could not be used against him (1st Tr.819).

So too, the statement was not admissible under the theory of curative admissibility, that "where the defendant has injected an issue into the case, the

state may be allowed to admit otherwise inadmissible evidence in order to explain or counteract a negative inference raised by the issue defendant injects." State v. Lingar, 726 S.W.2d 728,734-35 (Mo.1987). The key is that the defendant must first have introduced the evidence. *Id*., 734-35.

But the defense did not introduce the topic of the escape from the Benton County Jail--it was the State that was anxious to elicit the details of the escape. Simply asking other questions about the escape, after the topic was raised by the State, does not open the door wide to any and all testimony--admissible or inadmissible--regarding the escape. Under the State's theory, it may raise a topic, but if the defense presents any facet of that topic, the State then may introduce inadmissible evidence.

The U.S. Supreme Court has recognized that a defendant should not be forced to give up his right to be free from self-incrimination, guaranteed by the Fifth Amendment, to assert his rights under the Fourth Amendment. Simmons v. United States, 390 U.S. 392-94 (1968). Nor should the defendant be forced into the "intolerable" situation of having to give up his Fifth Amendment rights to assert his right to counsel under the Sixth Amendment. State v. Samuels, 965 S.W.2d 913, 920 (Mo.App.1998). So too, Kenny should not have to choose between his Sixth Amendment right to confront the evidence against him and his Fifth Amendment right to be free from self-incrimination.

The court forced Kenny to choose between two valuable constitutional rights: his right to defend by confronting and cross-examining the witnesses

against him and eliciting evidence mitigating the escape, State v. Whitfield, 837 S.W.2d 503, 512 (Mo.1992), and his right to be free from compelled self-incrimination. The court improperly conditioned Kenny's cross-examination of Spencer—to have Spencer explain an aggravating factor and thereby defend against this aggravating evidence—on Kenny's waiving his right to be free from compulsory self-incrimination.

The court erred in allowing the state to elicit evidence that Kenny was the inmate who picked the locks to enable the escape. On the ultimate issue, this evidence edged the sentencer away from a life sentence and to a sentence of death. The State stressed the inadmissible statement in closing: "[Kenny] picked the lock on the cell. He picked the lock on the door" (Tr.1053). It argued that the jury could not trust Kenny's great behavior at Potosi, since Kenny had been good at the Benton County Jail too before his escape (Tr.1053-54). The State used the fact that Kenny was the one who picked the locks to show he was a manipulator who was in gear to escape again (Tr.1025-26;1053-55).

The sentencer's consideration of inadmissible evidence in assessing the death sentence violated Kenny's rights to due process, a fair trial, and freedom from compelled self-incrimination and cruel and unusual punishment. Kenny should not have been forced to choose between his constitutional rights in fighting for his life. This Court must grant him a new trial.

ARGUMENT VII

The trial court abused its discretion during closing in overruling Kenny's objection to the State's comment that Kenny was merely "building a case" by presenting evidence that he was voted as the laundry worker of the month, and plainly erred in letting the State make comments that set the jury forth as the voice of the victims; misstated the goal of a capital sentencing as solely to obtain justice for the victims; urged the jury to ignore mitigating evidence; and compared the rights of the victims to Kenny's rights at the sentencing trial. The State's repeated violations during closing deprived Kenny of his rights to due process, a trial before a fair/impartial jury, and freedom from cruel and unusual punishment. U.S.Const., Amends. V,VI,VIII,XIV; Mo.Const., Art.I,§§10,18(a),21. The arguments constituted improper personalization and misstatement of the law and penalized Kenny for exercising his constitutional rights. The trial court's approval of these improper arguments prejudiced Kenny and affected the outcome of the trial by (1) allowing the State to skew the jury's view of how mitigation evidence should be evaluated, (2) allowing the State to urge the jury to abdicate its role as impartial fact-finder and to consider Kenny's constitutional rights as an aggravating factor against him, and (3) erroneously considering, itself, the State's improper arguments in sentencing Kenny to death.

The State committed three categories of error in its closing arguments. It engaged in improper personalization by urging the jurors to speak for the victims and telling the jury that the victims were crying out for justice, *i.e*, a death sentence. It misstated the law by arguing that the only purpose of a capital sentencing was to obtain justice for the victims and that the mitigating evidence meant nothing if it did not relate to justice for the victims. Lastly, the State juxtaposed the rights that Kenny had with the rights that the victims were denied.

Although trial courts have wide discretion in controlling closing arguments, they abuse that discretion when they allow argument that is plainly unwarranted and that has a decisive effect on the jury. State v. Newlon, 627 S.W.2d 606, 616 (Mo.1982). "Trial courts have a duty to ensure that every defendant receives a fair trial, which requires the exercise of its discretion to control obvious prosecutorial misconduct *sua sponte*." State v. Roberts, 838 S.W.2d 126, 131 (Mo.App.1993).

The State argued that "[the Mennings'] only opportunity to ask for justice is here (Tr.1012). It argued that the sentencing was "their say" and that "their voice will come from the jury" (Tr.1012). The State asked the jury, "will their cries for justice be heard and will this jury sentence [Kenny] to death for what he did to them?" (Tr.1027). It argued, "the victims were given no chance to cry out for justice or cry out for help. This is their shot" (Tr.1053).

The State's argument constituted improper personalization, by asking the jurors to place themselves in the shoes of the victims. State v. Simmons, 955 S.W.2d 729,740 (Mo.1997). On behalf of the victims and their "cries for justice,"

the State requested a death sentence. But "admission of a victim's family members' characterizations and opinions about the appropriate sentence are inadmissible." State v. Taylor, 944 S.W.2d 925, 938 (Mo.1997); *see also* Booth v. Maryland, 482 U.S. 496 (1987).

The State also misstated the law. It argued repeatedly that the goal of the sentencing was solely to obtain justice for the Mennings and should focus on whether the Mennings "deserve what they got" (Tr.1012,1013,1018-19,1027). It urged the jury to consider the mitigation evidence only as to how it related to justice for the Mennings (Tr.1013). The State encouraged the jury to ignore mitigating evidence by referring to relevant mitigating evidence as merely "a sign of a man who's building a case" (Tr.1054-55).[8]

This Court condemned this argument in State v. Storey, 901 S.W.2d 886, 902 (Mo.1995). The argument "seriously misstates" the law by oversimplifying what the jury should consider in assessing punishment. It leads the jury to believe that only one thing is important--justice for the Mennings--and that the wide array of aggravating and mitigating circumstances can be ignored. *Id*. By urging the jury to consider only whether the Mennings got what they deserved, the State weighed the value of the victims' lives against the value of Kenny's life. *Id*.

[8] Counsel objected only to this comment and included it in the motion for new trial (L.F.327-28). Since counsel did not object to the other comments, Kenny requests review of those comments for plain error. Rule 30.20.

A capital sentencing must focus on both the nature of the offense and the individual defendant. Woodson v. North Carolina, 428 U.S. 280, 304 (1976). By urging the jury only to consider whether the Mennings got what they deserved and to give weight to evidence only if it related to justice for the Mennings, the State encouraged the jury to ignore a large portion of what it was required to consider. By arguing that the presentation of mitigation evidence was merely the sign of someone trying to "build a case," the State urged the jury to disregard the mitigating evidence.

But the U.S. Supreme Court has spelled out repeatedly that a capital jury must "not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604 (1978). So, too, "the sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence.'" Skipper v. South Carolina, 476 U.S. 1, 4 (1987). In a capital case, where a barrier to the jury's consideration of mitigation is imposed, the verdict is unreliable. Mills v. Maryland, 486 U.S. 367, 375 (1988). Prosecutorial argument that misleads the jury by improperly describing its role and responsibilities violates the Eighth Amendment. Romano v. Oklahoma, 512 U.S. 1, 9 (1994).

Lastly, the State argued that Kenny "took every right that Clarence and Arlene Menning ever had…. They were given no opportunity to ask for mercy" (Tr.1012). In rebuttal, the State reiterated that the victims had no chance to ask for

mercy or "to cry out for justice or cry out for help" (Tr.1052,1053). It argued that Kenny was the judge, jury, and executioner of both victims (Tr.1052).

The argument improperly juxtaposed the constitutional rights that Kenny had with the rights that were denied the victims. But the sentencer may not "use the sentencing process to punish a defendant, guilt notwithstanding, for exercising his or her right to receive full and fair trial." Vickers v. State, 17 S.W.3d 632, 634 (Mo.App.2000); *see also* U.S. v. Jackson, 390 U.S.570, 581-83 (1968).

Through its arguments, the State skewed the entire procedure under which the jury was supposed to assess Kenny's punishment. Without the improper arguments, sentencing would not have gone to the court, and Kenny would not have been sentenced to death.

ARGUMENT VIII

The trial court abused its discretion in sustaining the State's strike for cause of venireperson Mathews because the ruling deprived Kenny of his rights to due process, a fair and impartial jury, and freedom from cruel and unusual punishment. U.S.Const., Amends.V,VI,VIII,XIV; Mo.Const., §§10,18(a),21. Mathews stated that she would find it difficult to sentence someone to death, but thought that she would be able to follow the instructions and consider the death penalty and thus she was qualified to serve on the jury.

"The decision whether a man deserves to live or die must be made on scales that are not deliberately tipped toward death." Witherspoon v. Illinois, 391 U.S. 510, 521, fn.20 (1968). Striking Venireperson Mathews for cause, based on her fear that she would have difficulty imposing a death sentence, improperly stacked the deck in favor of death and violated Kenny's rights to due process, a fair and impartial jury, and freedom from cruel and unusual punishment. U.S.Const., Amends. V,VI,VIII,XIV; Mo.Const., Art. I, §§10,18(a),21.

Although the trial court has broad discretion in determining the qualifications of a prospective juror, the trial court's ruling should be disturbed on appeal when it is clearly against the evidence and constitutes a clear abuse of discretion. State v. Rousan, 961 S.W.2d 831, 839 (Mo.1998).

The Supreme Court has repeatedly recognized that a venireperson's conscientious scruples against the death penalty do not, in themselves, warrant a strike for cause. A prospective juror may be excluded for cause based on his views on capital punishment only when the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instruction and his oath." Wainwright v. Witt, 469 U.S. 412, 424 (1985). If a juror is excluded on any broader basis, the death sentence cannot be carried out. *Id*.,522, n.21. A venireperson scrupled against the death penalty cannot be struck for cause unless those scruples would cause him not to be able to follow the instructions and his oath. Boulden v. Holman, 394 U.S. 478, 483-84 (1969). The Supreme Court has recognized that "[a] man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him . . . and can thus obey the oath he takes as a juror." Witherspoon, 391 U.S., 519.

The prosecutor individually questioned Mathews after asking whether anyone, because of personal views, "could not realistically consider imposing a sentence of death" (Tr.161). Mathews explained that "I just have difficulty pondering the idea of sentencing someone to death. I know the man needs to be punished, but I don't know that in a setting with eleven other peers I would be able to make that decision. It's a doubt I have about being able to make that decision" (Tr.161-62). Mathews stated that she thought she could follow the four-step process outlined by the prosecutor, but that "the final decision would be difficult for me" (Tr.162). When asked if she had personal opinions about the death

penalty that would impair or prevent her from considering the death penalty, Mathews responded that she would "have trouble deciding to take another person's life" (Tr.162). The prosecutor asked Mathews whether she would be able to serve as foreman and sign the verdict (Tr.162-63). Mathews responded that "I think I would have difficulty with that decision. If I looked at all the parameters, which we can't do right now, and if everything pointed that way, if everyone else was convinced about it, I might go along. But I don't think my conscience would be where I would want it to be on that" (Tr.163). Mathews stated that the decision would be difficult based on religious and personal beliefs (Tr.163). Mathews finally stated that her beliefs might prevent her from being able to vote for the death penalty in any situation (Tr.163).

But when questioned by defense counsel, Mathews retreated from any absolute position. She reiterated that she would have difficulty reaching the decision to impose a death sentence, but would have "no problem" deliberating with the other jurors as to whether an aggravating circumstance existed and probably would not have a problem with the remaining three steps (Tr.188-89). She stated that if the jury went through all four steps and found Thompson eligible for the death penalty, she did not know whether she could vote to impose it (Tr.189). Mathews expressed "the uncertainty of how I might feel at that point" and that she had a doubt and could not give a definite answer based on a hypothetical situation (Tr.189-90). However, she affirmed that "when it comes right down to it I possibly could [impose the death penalty] (Tr.191).

The court struck Mathews based on her supposed inability to sign the verdict form and her equivocation on whether she could vote to impose death (Tr. 193-94).

The strike against Mathews was precisely the type of strike forbidden by the Supreme Court in Adams v. Texas, 448 U.S. 38 (1980). The Supreme Court held that the trial court had improperly excluded jurors from service by the "possibility" that they would be affected by the death penalty. *Id*.,49. The Court held that "neither nervousness, emotional involvement, nor inability to deny or confirm any effect whatsoever is equivalent to an unwillingness or an inability on the part of the jurors to follow the court's instructions and obey their oaths." *Id*.,50. It was error to "exclude jurors whose only fault was to take their responsibilities with special seriousness or to acknowledge honestly that they might or might not be affected." *Id*.,50-51.

So, too, it was error to exclude Venireperson Mathews based on her sensibility to the fact that it would be difficult to sentence a man to death. Mathews did not express an unwillingness or inability to impose a death sentence if the facts warranted it--rather, she stated that she thought she could follow the law and the instructions, and that "the final decision would be difficult for me" (Tr.162). She did not state that she could not sign the verdict form, only that it would be difficult (Tr.163). She stated that she could vote for death, even though her conscience would "not be where I would want it to be on that" (Tr.163).

Mathews' responses also are almost indistinguishable from the answers of venireperson Bounds in Gray v. Mississippi, 481 U.S. 648 (1987). Bounds was "clearly qualified to serve as a juror under the Adams and Witt criteria." *Id*.,659. The Supreme Court stressed that "although the voir dire of member Bounds was somewhat confused, she ultimately stated that she could consider the death penalty in an appropriate case." *Id*.,653. Bounds stated that she did not have conscientious scruples against the death penalty if it is authorized by law. *Id*.,654, fn.5. The trial court characterized Bounds as "totally indecisive" and that "she says one thing one time and one thing another." *Id*., 656, fn.7. When asked if she could vote for the death penalty, Bounds stated, "I think I could." *Id*. When questioned again, Bounds stated that she could vote to impose the death penalty if the defendant were found guilty. *Id*.,654.

Mathews' responses did not warrant a strike for cause. Instead, they merely indicated that she would not take lightly her task of determining whether Kenny should live or die. Mathews indicated that she could follow the instructions and possibly sentence Kenny to death. Without hearing all the evidence, that is all that should be required of any venireperson. If the State was not satisfied with Mathews' answers, it could have used a peremptory strike against her. By striking Mathews for cause based on her difficulty in pondering sentencing a man to death, the trial court abused its discretion. The death sentence, imposed by a jury that was stacked for death, cannot stand.

ARGUMENT IX

The trial court erred in denying Kenny's motions to strike the "rape aggravator" under Section 565.032.2(11) pled by the state on both murder counts, in overruling Kenny's objections, and in submitting to the jury Instructions No. 6 and 11 (MAI-CR3d 313.40) which included this statutory aggravating circumstance, and further erred in considering this aggravator in sentencing Kenny to death. This violated Kenny's rights to due process of law and a fair jury trial, to not be twice placed in jeopardy and to reliable sentencing and freedom from cruel and unusual punishment. U.S.Const., Amends. V,VI,VIII,XIV; Mo.Const., Art. I, §§10,18(a),19,21. Kenny was prejudiced, because neither the jury nor judge should have considered the aggravator after another jury had been unable to find the aggravator beyond a reasonable doubt.

At the instruction conference, defense counsel renewed the previously filed defense motion (L.F.236-38) and objected to Instructions No. 6 and 11 instructing the jury to consider whether the murders were committed while Kenny was engaged in the perpetration of rape (Tr.923). Defense counsel argued that submission of the "rape aggravator" after another jury had failed to find that the State had proven it, would constitute a violation of Kenny's right to be free from double jeopardy (Tr.923-27). The trial court overruled the objection, and defense counsel included this ruling in the motion for new trial (Tr.929;L.F.325-26).

Instruction No. 6, patterned after MAI-CR3d 313.40, was as follows:

Instruction No.6

In determining the punishment to be assessed against defendant for the murder of Clarence Menning, you must first unanimously determine whether one or more of the following statutory aggravating circumstances exist:

1. Whether the murder of Clarence Menning was committed while the defendant was engaged in the attempted commission of another unlawful homicide of Arlene Menning. A person commits the unlawful homicide of murder in the first degree if he knowingly causes the death of another person after deliberation upon the matter. A person 'acts knowingly" . . . with respect to a result of his conduct when he is aware that his conduct is practically certain to cause that result. Deliberation means cool reflection upon the matter for any length of time no matter how brief. An attempt to commit an offense is the doing of any act, with the purpose of committing an offense, which is a substantial step towards the commission of the offense. A substantial step towards the commission of an offense means conduct which is strongly corroborative of the firmness of a purpose to complete the commission of offense.

2. Whether the murder of Clarence Menning involved depravity of mind and whether, as a result thereof, the murder was outrageously and wantonly vile, horrible and inhuman. You can make a determination of

depravity of mind only if you find that the defendant committed repeated and excessive acts of physical abuse upon Clarence Menning and the killing was therefore unreasonably brutal.

3. Whether the murder of Clarence Menning was committed while the defendant was engaged in the perpetration of rape. A person commits the crime of forcible rape if he has sexual intercourse with another person by the use of forcible compulsion. Forcible compulsion means either (a) physical force that overcomes reasonable resistance; or (b) a threat, expressed or implied that places a person in reasonable fear of death, serious physical injury or kidnapping of himself or another person.

You are further instructed that the burden rests upon the state to prove at least one of the foregoing circumstances beyond a reasonable doubt. On each circumstance that you find beyond a reasonable doubt, all twelve of you must agree as the existence of that circumstance.

Therefore, if you do not unanimously find from the evidence beyond a reasonable doubt that at least one of the foregoing statutory aggravating circumstances exists, you must return a verdict fixing the punishment of the defendant at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

(L.F. 245-46).[9]

In Bullington v. Missouri, 451 U.S. 430 (1981), the Supreme Court held that "[b]ecause the sentencing proceeding at petitioner's first trial was like the trial on the question of guilt or innocence, the protection afforded by the Double Jeopardy Clause to one acquitted by a jury also is available to him, with respect to the death penalty, at his retrial. *Id*.,446.

The principle of collateral estoppel is "embodied in the Fifth Amendment guarantee against double jeopardy." Ashe v. Swenson, 397 U.S. 436, 446 (1970). "'Collateral estoppel' ... means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Id*. at 443. Under the principle of "collateral estoppel," the jury's failure at Kenny's first sentencing trial to find the aggravating circumstance that the murders were committed during perpetration of rape precludes submitting that circumstance to the jury at a sentencing retrial. *Id*.

Kenny acknowledges that this Court has previously rejected the point and argument proffered here. State v. Storey, 40 S.W.3d 898, 914-15 (Mo.2001). However, in light of recent developments in the law, appellant respectfully submits that it is appropriate for the Court to reexamine its earlier holding.

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[9] Instruction No.11 set forth the same language as Instruction No.6, but switched the name Arlene Menning for Clarence Menning, and vice versa (L.F.252-53). For the sake of brevity, it is not set forth herein.

In Poland v. Arizona, 476 U.S. 147 (1986), the Court affirmed Bullington, but declined "to extend Bullington further and view the capital sentencing hearing as a set of minitrials on the existence of each aggravating circumstance." 476 U.S.,156. The Court rejected the idea "that a capital sentencer's failure to find a particular aggravating circumstance alleged by the prosecution always constitutes an "acquittal" of that circumstance for double jeopardy purposes." *Id*.,155.

Recent decisions of the Supreme Court suggest that the Court has begun to reexamine the application of the double jeopardy clause to sentencing and, in particular, whether a "fact" that must be found to exist to increase punishment is an element of the offense or instead, is a "sentencing factor." *See* Monge v. California, 524 U.S. 721, 738-41 (1998)(Souter, J., dissenting).

Jones v. United States, 526 U.S. 227 (1999) and Apprendi v. New Jersey, 530 U.S. 466 (2000) support Kenny's point.

In Jones, the Court held that the provisions of a carjacking statute that established higher penalties to be imposed when the offense resulted in serious bodily injury or death set forth additional elements of the offense that must be charged in an indictment and proved to the jury beyond a reasonable doubt, and were not "mere sentencing considerations." 526 U.S., 232. The court noted that the "look" of the statute - the fact that the provisions appeared to concern only sentencing - did not determine whether the provision in question was a sentencing factor or an element of the offense. *Id*., 233. Rather, it was necessary to examine what was required under the provisions. *Id*. The "enhanced" levels of punishment

"not only provide[d] for steeply higher penalties, but condition[ed] them on further facts (injury, death) that seem quite as important as the elements in the principal paragraph (e.g., force and violence, intimidation)." *Id*. The Court found this an indication that the enhancement provisions were elements of separate offenses even though the statute "looked" as though there was only one offense. *Id*.

In Apprendi, the Court held that the Fourteenth and Sixth Amendments require that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury and proven beyond a reasonable doubt." *Id*.,476, *citing* Jones, 526 U.S., 243,n.6.

Under Apprendi and Jones, the statutory aggravating circumstances set out in §565.032.2 are elements of the offense providing alternate means by which the offense of capital murder may be committed. As in Jones, *supra*, the fact that §565.020 sets out both the sentence of life imprisonment and the sentence of death does not control. Because additional facts, as set forth in the statutory aggravators listed in §565.032, must be established before a defendant may be sentenced to death, the statutory aggravators are actually elements of the offense.

Accordingly, the double jeopardy provisions of the Fifth Amendment and the due process provisions of the Fourteenth Amendment should apply to a jury's determination of aggravating circumstances. A jury's failure to "find" a statutory aggravating circumstance must be treated as an acquittal of that element. When a jury has failed to "find" a statutory aggravating circumstance, submitting the same

aggravating circumstance at a subsequent proceeding violates the double jeopardy and due process clauses of the Fifth and Fourteenth Amendments.

The error in resubmitting the rape aggravator was not harmless. There was an abundance of strong mitigating evidence. It is simply not possible to say that the jury would have reached the same result if this aggravator had not been submitted. *See* Carter v. Bowersox, 265 F.3d 705 (8th Cir.2001). Likewise, had the judge not considered the rape aggravator, he may have sentenced Kenny to life.

For the foregoing reasons, the trial court erred in overruling Kenny's motion to strike, in overruling his objections to Instructions 6 and 11 and in submitting those instructions to the jury, and in considering, himself, the rape aggravator. The Court must vacate Kenny's sentence of death and remand for a new trial.

ARGUMENT X

The trial court plainly erred[10] in failing to declare a mistrial or impose a sentence of life imprisonment, because (1) the State failed to include in the information or first amended information the aggravating circumstance/s that the State would rely on and prove beyond a reasonable doubt to obtain a conviction of the offense of "aggravated" first-degree murder; and (2) the jury, not the judge, was the fact-finder and was responsible for determining whether the State had proven an aggravating circumstance beyond a reasonable doubt, so as to make Kenny eligible for the death penalty. The court's assumption of the jury's role in assessing sentence and its imposition of the death penalty, without having charged Kenny with "aggravated" first-degree murder, violated Kenny's rights to due process, a fair trial, and freedom from cruel and unusual punishment. U.S.Const., Amends. V,VI,VIII,XIV; Mo.Const., Art. I, §§2,10,17,18(a),21. Kenny was prejudiced, because he was sentenced for a crime that was not alleged in the information and was denied his right to have a jury of his peers determine if he was guilty of "aggravated" first-degree murder. To the extent that Section 565.030.4(4) allows the court to find the aggravating circumstance/s in the event of a hung jury, it is unconstitutional.

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[10] This issue is not preserved for review, so Kenny requests that the Court review it for plain error. Rule 30.20.

In Apprendi v. New Jersey, 530 U.S.466, 469 (2000), the U.S. Supreme Court recognized that due process and other jury protections extend to determinations regarding the length of sentence. Apprendi, 530 U.S., 484. Relying on Jones v. United States, 526 U.S. 227 (1997), the Court held that the Fifth, Sixth, and Fourteenth Amendments demand that any fact, other than prior conviction, that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt. *Id*.,476,490. It deemed unconstitutional any statute that "remove[s] from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." *Id*. The key inquiry is whether "the required finding expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict." *Id*.,494.

Missouri has expressly provided by statute that life imprisonment without the possibility of probation or parole (LWOP) is the maximum sentence that may be imposed for first-degree murder unless the trier finds at least one statutory aggravating circumstance beyond a reasonable doubt. Section 565.030.4(1); State v. Shaw, 636 S.W.2d 667, 675 (Mo.1982).

While the "form" of Missouri's statutory scheme, and §565.020 appear to create only one crime--first-degree murder punishable by either LWOP or death--the "effect" of the statute is quite different. In reality, there exist in Missouri both the offense of "unaggravated" first-degree murder, for which the only authorized punishment is LWOP; and the offense of "aggravated" first-degree murder, for

which the authorized punishments include both LWOP and death. To reach the offense of "aggravated" first-degree murder, the State must plead and prove at least one aggravating circumstance. If the State does not prove an aggravating circumstance beyond a reasonable doubt, the offense remains "unaggravated" first-degree murder and the punishment is limited to LWOP.

I. Neither the Information Nor the Amended Information Alleged "Aggravated" First-Degree Murder

"[A] person cannot be convicted of a crime with which the person was not charged unless it is a lesser included offense of a charged offense." State v. Parkhurst, 845 S.W.2d 31, 35 (Mo.1992). "The indictment or information must actually charge that a crime has been committed." State v. Stringer, 36 S.W.3d 821, 822 (Mo.App.2001).

Neither the information nor the amended information "charged" any facts--statutory aggravating circumstances--to support the State's later allegation that Kenny committed two counts of "aggravated" or "capital" first-degree murder (L.F.20-21,24-25). The State must prove at least one aggravating circumstance to bump the maximum sentence for first-degree murder from LWOP to death. Section 565.030.4(1). By failing to allege in the information how the first-degree murder charges were "aggravated" to make the crime capital murder, the sentence could be no more than that for "unaggravated" first-degree murder: LWOP.

The information's fatal defect in failing to state the aggravating circumstance/s that the State would rely on and prove beyond a reasonable doubt

to obtain a conviction of "aggravated" first-degree murder, punishable by death, violated Kenny's rights to be tried on, and convicted of, only the offense charged. U.S.Const., Amends. V,VI,VIII,XIV; Mo.Const., Art. I, §§ 2,10,17,18(a),21.

II. The Judge Could Not Find the Aggravators So As to Make Kenny Eligible for the Death Penalty

The Apprendi rule--that any facts extending punishment must be proven to a jury beyond a reasonable doubt--mandates that the jury determine whether the State has proven an aggravating factor beyond a reasonable doubt. 530 U.S., 476,490. The finding of an aggravator extends the range of punishment from LWOP to death. §565.030.4(1). Without that finding by the jury, the court may not impose a death sentence.

Unless the defendant affirmatively waives his right to a jury trial, he has the right to have the jury find the elements of "capital" murder and assess whether he should receive LWOP or death. §§565.006, 565.030.2. The Supreme Court has stressed that there is "a strong interest in having the jury express the conscience of the community on the ultimate question of life or death." Lowenfield v. Phelps, 484 U.S. 231, 238 (1988). But when the jury indicated it could not agree on Kenny's punishment, the court commandeered the jury's responsibility (Tr.1079). In light of the Supreme Court's mandate in Apprendi, the court should have either declared a mistrial or imposed a sentence of LWOP.

The Apprendi opinion did not invalidate those state statutes that require the judge to find specific aggravating circumstances before imposing a death sentence, after the jury has found the defendant guilty of capital murder. *Id.*,497. The Court may soon address that question. But Apprendi did make clear that only a jury can determine the existence of factors that make a crime a capital offense. *Id*.

A trial court may not find the element that bumps first-degree murder to a capital crime. In the present case, the trial court made its own findings of aggravating circumstances and relied on those findings in sentencing Kenny to death. In so doing, the court "determine[d] the existence of a factor which makes a crime a capital offense," which the Supreme Court has repeatedly, strictly forbidden. Apprendi, 530 U.S., 437, *quoting* Almandarez-Torres v. U.S., 523 U.S. 224, 257 n.2 (1998)(Scalia, J., dissenting).

To the extent that §565.030.4(4) allows the court to assume the role of the jury and make the findings of aggravating circumstances, the statute is unconstitutional and cannot stand. The court's assumption of the jury's role of fact-finder violated Kenny's rights to due process, a fair trial, and freedom from cruel and unusual punishment. This Court must vacate Kenny's death sentence and remand for a new sentencing trial.

ARGUMENT XI

The trial court erred in overruling Kenny's objections and submitting to the jury Instructions No. 10 and 15 (MAI-CR3d 313.48A), because submission of the instructions violated Kenny's rights to due process, a fair jury trial, and freedom from cruel and unusual punishment. U.S.Const., Amends. V,VI,VIII,XIV; Mo.Const., Art. I, §§10,18(a),21. The instructions gave the jury directions for reaching a verdict, yet failed to comply with the substantive law, §565.030.4(3), by failing to include the "third step" of the deliberation process – that if, after finding at least one statutory aggravating circumstance, each juror determined that the mitigating circumstances outweighed the aggravating circumstances, the jury must sentence the defendant to a term of life imprisonment without the possibility of probation or parole. The omission of a step mandated by statute prejudiced Kenny by misleading the jurors to think that they could ignore evidence of mitigating circumstances altogether, thereby lessening the State's burden of proof as to punishment.

Defense counsel timely objected to Instructions No. 10 and 15, patterned after MAI-CR3d 313.48A, on the ground that they were confusing because they failed to set forth the third step in the deliberative process (Tr.929). The trial court overruled the objection (Tr.931). The defense included this issue in the motion for new trial (L.F.326).

Instruction 10, MAI-CR3d 313.48A, read:

INSTRUCTION No. 10

When you retire to your jury room, you will first select one of your number to act as your foreperson and to preside over your deliberations.

You will be provided with forms of verdict for your convenience. You cannot return any verdict imposing a sentence of death unless all twelve jurors concur in and agree to it, but any such verdict should be signed by your foreperson alone.

As to Count I, if you unanimously decide, after considering all of the evidence and instructions of law given to you, that the defendant must be put to death for the murder of Clarence Menning, your foreperson must write into your verdict all of the statutory aggravating circumstances submitted in Instruction No. 6 which you found beyond a reasonable doubt, and sign the verdict form so fixing the punishment.

If you unanimously decide, after considering all of the evidence and instructions of law, that the defendant must be punished for the murder of Clarence Menning by imprisonment for life by the Department of Corrections without eligibility for probation or parole, your foreperson will sign the verdict form so fixing the punishment.

If you are unable to unanimously find the existence of at least one statutory aggravating circumstance beyond a reasonable doubt, as submitted in Instruction No. 6, or if you are unable to unanimously find

that there are facts and circumstances in aggravation of punishment which warrant the imposition of a sentence of death, as submitted in Instruction No. 7, then your foreperson must sign the verdict form fixing the punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

If you do unanimously find the matters described in Instructions No. 6 and 7, but are unable to agree upon the punishment, your foreperson will sign the verdict form stating that you are unable to decide or agree upon the punishment. In such case, the Court will fix the defendant's punishment at death or at imprisonment for life by the Department of Corrections without eligibility for probation or parole. You will bear in mind, however, that under the law, it is the primary duty and responsibility of the jury to fix the punishment.

When you have concluded your deliberations you will complete the applicable forms to which all twelve jurors agree and return them with all unused forms and the written instructions of the Court.

(L.F.250-51).[11]

Instructions 10 and 15 failed to include a critical step of the deliberation

[11] Instruction No. 15 was identical to 10, other than being modified to fit the murder count regarding Arlene Menning (L.F.257-58). For the sake of brevity, it is not set forth herein.

process. They failed to tell the jury that if, after finding at least one statutory aggravating circumstance, each juror determined that the mitigating circumstances outweighed the aggravating circumstances, the jury must sentence the defendant to a term of life imprisonment without the possibility of probation or parole (LWOP) as required by Missouri law.

Omitting this language from Instructions 10 and 15 was prejudicial because these instructions functioned as verdict directors. They took the jury, step by step, through the deliberation process. The absence from the instructions of the step requiring the jury to weigh the mitigating evidence against the aggravating evidence rendered the sentencing process unreliable and violated the Eighth Amendment.

The "qualitative difference between death and other penalties" calls for "a greater degree of reliability when the death sentence is imposed." Lockett v. Ohio, 438 U.S. 586, 602 (1978). Accordingly, the Supreme Court has steadfastly construed the Eighth Amendment as requiring that nothing preclude the sentencer in a capital case "from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id*., 604; Skipper v. South Carolina, 476 U.S. 1, 4 (1986); Eddings v. Oklahoma, 455 U.S. 104, 110 (1982). MAI-CR3d 313.48A fails to implement this requirement because it omits the "third step" of weighing of mitigating circumstances against aggravating circumstances.

Where ambiguity in a jury instruction creates "a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence," the instruction violates the Eighth Amendment. Boyde v. California, 494 U.S. 370, 380 (1990). Although the Eighth Amendment does not require a jury to be instructed on mitigating evidence, instructions that are given may not 'preclude the jury from being able to give effect to mitigating evidence,' or create '"a reasonable likelihood that the jury has applied the challenged instructions in a way that prevents the consideration of constitutionally relevant evidence."' Buchanan v. Angelone, 522 U.S. 269, 276 (1998), *quoting* Boyde, 494 U.S., 380.

Kenny acknowledges that in State v. Storey, 40 S.W.3d 898,913 (Mo.2001), the Court considered and denied a similar claim. Kenny includes this point here in the hope that the Court will reconsider that holding in light of Carter v. Bowersox, 265 F.3d 705 (8th Cir.2001). There, the trial court failed to instruct the jury on the second step of the four-step process outlined in §565.030--that if the jury were unable to unanimously decide that the facts in aggravation warranted death, it had to return a verdict of LWOP. *Id*.,708.

The Eighth Circuit held that failure to instruct on the second step of the statute was a miscarriage of justice that violated Carter's due process rights under the Fourteenth Amendment. *Id*.,717.

If omission of the second step from the instruction is a miscarriage of justice that warrants a new sentencing phase, omission of the third step should

warrant a new sentencing as well. Instructions 10 and 15 created a substantial likelihood that the jury failed to consider all relevant mitigating facts and circumstances. In this area of the law, where life hangs in the balance, the Court may not approve the failure of the MAI instruction to comply with the constitutionally critical step of a fully constitutional weighing of aggravating and mitigating circumstances. Sanctioning such erroneous procedures not only amounts to revising the statute, it incurs the very real risk that the procedures followed in imposing the death sentence in this case were arbitrary and capricious.

No assurances of reliability exist here. Submission of these defective penalty phase instructions left the jury without an accurate description of the steps they were obligated to follow in making the sentencing decision. Carter, 265 F.3d,717. Kenny's sentence of death was imposed in violation of his state and federal constitutional rights to due process of law, reliable sentencing, and freedom from cruel and unusual punishment. The sentences of death must be vacated and the cause remanded for a new penalty phase proceeding.

ARGUMENT XII

Kenny's death sentence is disproportionate under §565.035. Upholding the sentence would violate Kenny's rights to due process and to be free from cruel and unusual punishment. U.S.Const., Amends.V,VIII,XIV; Mo.Const., Art.I, §§10, 21. Kenny's sentence was the result of many arbitrary factors and of passion and prejudice. The sentence of death is disproportionate to the penalty imposed in similar cases.

Section 565.035 mandates this Court to set a death sentence aside when it believes that (1) the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors; (2) the evidence does not support the aggravating factors; or (3) the sentence is disproportionate to the sentences imposed in similar cases, considering the crime, the strength of the evidence, and the defendant.

In Cooper Industries v. Leatherman Tool Group Inc., 532 U.S. 424 (2001), the U.S. Supreme Court held that appellate courts should apply *de novo* review to awards of punitive damages. Appellate courts should consider three criteria:

(1) the degree of the defendant's reprehensibility or culpability;

(2) the relationship between the penalty and the harm to the victim caused by the defendant's actions; and

(3) the sanctions imposed in other cases for comparable misconduct.

Id. Appellate courts must engage in an independent review of these criteria.

The Supreme Court justified *de novo* review of these awards based on the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishment, which is applicable to the States under the due process clause of the Fourteenth Amendment. The Court found that a jury's award of punitive damages is analogous to cases "involving deprivations of life," where a jury has found that death is an appropriate sentence. *De novo* review "helps to assure the uniform treatment of similarly situated persons that is the essence of law itself." *Id*.,1685.

The Cooper opinion implicitly holds that *de novo* review is appropriate in cases where the jury has found that death is the appropriate sentence. Certainly, if this type of independent review is warranted in cases where only money is at stake, it must also apply when a human life is at stake. Unlike pecuniary awards, the loss of a human life cannot be reversed. *See* State v. Black, 50 S.W.3d 778, 793-99 (Mo.2001)(Wolfe, J., dissenting). Failure to provide the review anticipated in Cooper would result in a denial of Kenny's right to due process and to be free from cruel and unusual punishment. U.S.Const., Amend.V,VIII; Mo.Const., Art.I§§10,18(a),21.

Review of the facts demonstrate that the death sentences were arbitrary and capricious, the result of passion and prejudice. The death sentences are unfair because they are not the verdicts imposed by the jury. The jury properly returned verdicts of LWOP, yet were rejected by the court (Tr.1066-69). Left without any guidance, the jury returned a "deadlocked" verdict, believing they had no other

option (Tr.1072-73). The sentence of death, imposed by the court, was the only sentence the jury had not been willing to render.

Throughout the trial, the State barraged the jury with highly prejudicial—yet irrelevant or inadmissible—evidence, while the defense was barred from presenting relevant mitigating evidence. *See* Arguments III-VII, *supra*. The State misled the jury to believe that another court had made a factual finding that Kenny had committed violence or other wrongdoing against another woman (Ex.89). The State misled the jury to believe that its role was to speak for the victims and should assess punishment only by considering justice for the victims, while ignoring the mitigation evidence (Tr.1012-13,1018-19,1027,1053).

The defense presented a wealth of mitigating evidence. Kenny has always been a hardworking man. He helped Clarence run his paper route, take care of the farm animals, and make repairs to the trailers (Tr.289-90). At the time of the crimes, Kenny was living out of his van, working full-time, and still helping care for his children (Tr.656,692-94). He was very distressed and had not eaten for days (Tr.375-76,657-65).

Kenny turned himself in to the police the same morning as the crimes (Tr.403-405). He gave the sheriff directions and waited about an hour for the sheriff to arrive (Tr.404-405,425). He was cooperative and polite to all law enforcement officers (Tr.417,420). He confessed to the crimes, told the police where they could find his van, and gave permission for the police to search his car and van (Tr.320,372,713). This Court has recognized that such cooperation can be

grounds for granting proportionality relief. State v. McIlvoy, 629 S.W.2d 333 (Mo.1982) (telephoning police 3 days after crime, turning himself in, and waiting for police to arrive were factors in favor of proportionality relief).

Kenny has demonstrated that he would work hard, get along with others, and not cause trouble, if he were sentenced to life imprisonment. Prior to the sentencing re-trial, Kenny was housed at Potosi for slightly over three years (L.F.31-32;Tr.1). During the bulk of that time, he qualified to be housed in the honor dorm (Tr.827-28). He worked his way up through several jobs—chopping vegetables for the kitchen, washing and mending clothes in the laundry room, and making student desks in the industry center (Tr.848,874,942,945). Kenny was one of three or four inmates chosen to be on the "haz-mat" team, cleaning spills such as blood, urine, and feces (Tr.936-37). Every one of Kenny's supervisors described him as quiet, hardworking, courteous and easy to get along with (Tr.851,854-57,875-76,886-87,942,950-51).

Missouri courts have sentenced similarly situated defendants to life imprisonment. Barry Holcomb beat and strangled his girlfriend, killing her and her six-month-old fetus, resulting in two sentences of life without parole. State v. Holcomb, 956 S.W.2d 286 (Mo.App.1997). Ann Marie Dulany and Ronald Conn were convicted of two counts of capital murder after they robbed an elderly couple, beat the wife to death, and beat the husband, before setting both on fire. State v. Dulany, 781 S.W.2d52 (Mo.1989); Conn v. State, 769 S.W.2d 822 (Mo.App.1989). Ronald Clements beat the victim with a baseball bat and threw

him in a well. State v. Clements, 789 S.W.2d 101, 103 (Mo.App.1990). Emery Futo bludgeoned to death his mother, then shot and stabbed his father, and shot his two brothers. State v. Futo, 932 S.W.2d 808,811-12 (Mo.App.1996). Each of these cases resulted in life sentences.

Unlike the victims in those cases, the Mennings were killed instantly and had no time to anticipate their fate. Kenny did not torture them, and the trial court rejected the allegation that Kenny acted with depravity of mind by repeated and excessive acts of physical abuse (Tr.1080;L.F.245-46). Kenny himself was bewildered as to why he would kill these people he loved, and he is genuinely remorseful (Tr.426-27,997).

This Court must utilize its power under Section 565.035 to ensure that death sentences are not imposed arbitrarily and capriciously. Upholding the death sentence would violate Kenny's rights to due process and to be free from cruel and unusual punishment. U.S.Const., Amends.V,VI,VIII,XIV; Mo.Const., Art.I,§§10,21. This Court must set aside the death sentences previously imposed upon Kenny Thompson.

CONCLUSION

Based on Arguments I and XII, Kenny respectfully requests that this Court vacate his death sentence and order that he be sentenced to life imprisonment without the possibility of probation or parole. Based on the remaining arguments, Kenny requests that the Court vacate his sentence and remand this case for a new sentencing trial.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that two copies of the foregoing were delivered to: The Office of the Attorney General, P. O. Box 899, Jefferson City, Missouri 65102; on the 31st day of January, 2002.

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Rosemary E. Percival